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No. _____

In The
Supreme Court of the United States
October Term, 1997

IN RE ASBESTOS LITIGATION:

JAMES FLANAGAN AND DAVID H. MIDDLETON,
Petitioners,

v.

GERALD AHEARN; JAMES MCADAMS DENNIS; CHARLES W. JEEP; JAMES DRAKE; JUANITA DRAKE; JAMES ELLISON; ROLAND DEARBORN; JUDITH DEARBORN; KERWIN BUTCHER; DIR., WORKERS COMP., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; PAUL COCHRAN; IDA BECK; MARION BEHEE; LONGSHORE INTERVENOR; WILLIAM JAMES MITCHELL; FIBREBOARD CORPORATION; BETHLEHEM STEEL CORPORATION; CONTINENTAL CASUALTY COMPANY; PACIFIC INDEMNITY; FRANCIS MCGOVERN; OWENS-ILLINOIS, INC.; PENN MUTUAL LIFE INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; CNA CASUALTY COMPANY OF CALIFORNIA; CELOTEX CORPORATION; DANIEL HERMAN RUDD, JR., ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; JOHN HANSEL, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE FIFTH CIRCUIT HEEDED THIS COURT'S "GVR" ORDER DIRECTING IT TO RECONSIDER THE SUBJECT CLASS-ACTION SETTLEMENT IN LIGHT OF *AMCHEM PRODUCTS, INC.* v. *WINDSOR*.

II.

WHETHER THE *AHEARN* GLOBAL SETTLEMENT IS IN CONSONANCE WITH THE LAW ENUNCIATED IN *AMCHEM PRODUCTS, INC.* v. *WINDSOR*.

PARTIES TO THE PROCEEDING

THE PETITIONERS: Petitioners Flanagan and Middleton are merchant seaman who were exposed to Fibreboard's asbestos-containing products during their sailing careers. They objected to the Global Settlement Agreement and were granted leave to intervene in the proceedings. In the underlying proceedings they were sometimes referred to as the "Maritime Claimants" or "Maritime Intervenors."

THE RESPONDENTS: The caption under which this Petition is filed lists the other parties to the underlying *Ahearn* v. *Fibreboard* litigation out of which this Petition arises.

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REPORTED OPINIONS AND ORDERS

The non-opt-out, Global Settlement Agreement being challenged was approved by the district court in *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505 (E.D.Tex. 1995) [A-201].

A divided panel of the Fifth Circuit Court of Appeals affirmed the trial court *sub nom. In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996) (*Ahearn I*) [A-70]. Rehearing *en banc* was denied over vigorous dissent by six members of this Court. *In re Asbestos Litigation*, 101 F.3d 368 (5th Cir.1996) [A-67]. Rehearing by the original panel was denied without comment, *In re Asbestos Litigation*, 1996 U.S.App.LEXIS 33548 (5th Cir., Dec. 3, 1996) (unpublished) [A-253].

Flanagan and Middleton petitioned this Court for writ of certiorari which was granted. *Flanagan* v. *Ahearn*, ___ U.S. ___, 117 S. Ct. 2503, 138 L. Ed. 2d 1008 (1997) (Docket No. 96-1379) [A-65]. On June 27, 1997, this Court remanded for further consideration in light of *Amchem Products, Inc.* v. *Windsor*, 521 U.S. ___, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), decided just two days earlier.

On remand, the Fifth Circuit reaffirmed in a five-paragraph unsigned opinion endorsed by two members of the original panel. *In re Asbestos Litigation*, 134 F.3d 668 (5th Cir. 1998) (*Ahearn II*) [A-1]. There was, again, a vociferous dissent by the Honorable Jerry Smith. 134 F.3d at 70 *et seq.* [A-3].

BASIS OF JURISDICTION

A. Jurisdiction In This Court

Pursuant to Supreme Court Rule 14(e), Petitioner states that jurisdiction lies in this Court by virtue of the following:

(i) Date judgment or order sought to be reviewed was entered: The Fifth Circuit's *Ahearn II* slip

opinion reported at 134 F.3d 668 was filed on January 27, 1998. The Memorandum to Counsel formally transmitting a hard copy of the opinion indicates that judgment was entered that same day, January 27, 1998.

(ii) Date of orders respecting rehearing: There were no petitions for rehearing or suggestions for rehearing en banc.

(iii) Petitioner does not rely on Rule 12.5.

(iv) Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: This Court has jurisdiction to review the Opinion and Judgment in question pursuant to 28 U.S.C. § 1254, which states:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

Under Supreme Court Rule 13.1, this Petition is timely as it is being filed within 90 days of the Fifth Circuit's opinion and judgment thereon.

(v) This provision is not applicable to this proceeding.

B. Jurisdiction In The Lower Courts

The Class Action Complaint filed in the district court alleged subject-matter jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship).

❧ ❧ ❧

CONSTITUTIONAL PROVISIONS AND COURT RULES PRIMARILY RELIED UPON BY PETITIONER

U.S. Const. art. III, § 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Federal Rule of Civil Procedure 23 [A-290].

STATEMENT OF THE CASE

This is the second Petition for Writ of Certiorari that Petitioners Flanagan and Middleton are forced to bring to this Court to challenge the non-opt-out, Global Settlement Agreement originally approved by the district court in *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505 (E.D.Tex. 1995) [A-201].

A divided panel of the Fifth Circuit Court of Appeals affirmed the trial court *sub nom. In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996) (*Ahearn I*) [A-70].

Rehearing *en banc* was denied, *In re Asbestos Litigation*, 101 F.3d 368 (5th Cir. 1996) (November 26, 1996) [A-67]. Rehearing by the original panel was denied without comment, *In re Asbestos Litigation*, 1996 U.S.App. LEXIS 33548 (5th Cir. Dec. 3, 1996) (unpublished) [A-253].

Flanagan and Middleton petitioned this Court for writ of certiorari which was granted. *Flanagan* v. *Ahearn*, ___ U.S. ___, 117 S. Ct. 2503, 138 L. Ed. 2d 1008 (1997) (Docket No. 96-1379) [A-65]. On June 27, 1997, this Court remanded for further consideration in light of *Amchem Products, Inc.* v. *Windsor*, 521 U.S. ___, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), decided just days earlier.

On remand, the cause was returned to the same three-judge panel which issued the *Ahearn I* decision. The parties were directed to submit "letter briefs" addressing the import of the *Amchem* decision and this

Court's GVR Order. On November 12, 1997, the court heard oral argument. [Transcript at A-33]. Present were the authors of the original *Ahearn I* opinion and dissent, Judges Davis and Smith.[1]

Judge Davis' comments and questions suggested that *Amchem* did not address Rule 23(a)'s commonality requirement [A-34]; that this Court's *Amchem* opinion "just rolled past commonality . . ." [A-34]; that the settlement is sufficient in and of itself to furnish the requisite common issues [A-38]; and that separate subclasses were not required for the presently-injured and future claimants [A-40-41].

The argument also had an aspect of unreality[2] as shown by the author of *Ahearn I*'s reluctance to acknowledge *Amchem*'s clear applicability to the instant case:

> JUDGE DAVIS: The Supreme Court in *Amchem* paid a lot of attention to the details of the settlement in the *Amchem* settlement. And they are strikingly different from the one in our case, are they not?

[A-41]

On January 27, 1998 the Fifth Circuit panel issued its opinion on remand. (*In re Asbestos Litigation*, 134 F.3d

---

1 The third panel member, Judge Reavley was absent for reasons unknown. The participants were advised that Judge Reavley would be provided with a tape recording of the oral argument.

2 It is worthy of mention that on remand these Petitioners and other persons who have objected to the Global Settlement were subjected to a not-so-subtle form of psychological warfare in which the Proponents of the Settlement adopted a pretense of bewilderment as to how the *Amchem* decision applied to *Ahearn*. A prime example: Following the remand the District Judge, during the course of a status conference held in the instant case, stated that he could not see for the life of him how *Amchem* applied to the instant case; and that, while he did not possess any "inside knowledge," he predicted that the Fifth Circuit panel would re-affirm *Ahearn* and that this Court would not grant certiorari a second time.

668 (5th Cir. 1998) (*Ahearn II*) [A-1]. In a five-paragraph unsigned opinion endorsed by two members of the original panel, the court reaffirmed its approval of the Global Settlement. The per curiam opinion, by its conclusions, suggests that it was folly for this Court to grant the writ of certiorari because *Ahearn* does not touch upon the principles set forth in *Amchem*.

There was, again, a vociferous Dissent by Judge Smith. 134 F.3d at 670-683 [A-3].

The panel majority's "opinion" (if the cursory, five-paragraph document can be so dignified) is remarkable in the most literal sense of the word; and indeed, it has been remarked upon. "The panel [majority] is thumbing its nose at the Supreme Court," said Professor Linda S. Mullenix, of the University of Texas School of Law. Rex Bossert, *Asbestos Case Deepens Rift In 5th Circuit*, National L.J., Feb. 16, 1998.

Mindful that the law does not require human beings to engage in idle ceremonies or vain acts[3], Petitioners sought neither panel rehearing nor rehearing en banc[4], but rather, proceeded straightaway to file this second Petition for Writ of Certiorari, confident that this Court does not regard its mandate as a mere scrap of paper which may be cavalierly disregarded.

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3 ***Ohio* v. *Roberts*, 448 U.S. 56, 74 (1980); *Northern Heel Corp.* v. *Compo Industries, Inc.*, 851 F.2d 456, 461 (1st Cir. 1988) ("The law should not be construed idly to require parties to perform futile acts or engage in empty rituals.")**

4 As noted by the dissenting judge after the *Ahearn I* decision, the disqualification of five circuit judges, coupled with the voluntary non-participation by a sixth, left a situation in which a super-majority of 82% would be required to secure en banc review in this matter. *In re Asbestos Litigation (Flanagan* v. *Ahearn)*, 101 F.3d 368, 369 (5th Cir. 1996) (Smith, J., dissenting from denial of rehearing en banc).

ARGUMENT

A. GROUNDS FOR GRANT OF CERTIORARI

Petitioners urge the grant of a writ of certiorari pursuant to this Court's Rule 10, as follows:

(1) The United States Court of Appeals for the Fifth Circuit "has decided an important federal question in a way that conflicts with the relevant decisions of this Court," those decisions being *Amchem Products, Inc.* v. *Windsor*, ___ U.S. ___, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) and the Court's GVR Order in this very case *In re Asbestos Litigation*, ___ U.S. ___, 117 S. Ct. 2503, 138 L. Ed. 2d 1008 (1997).

(2) The United States Court of Appeals for the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" (Rule 10[a]).

B. A JURIST'S PERSONAL FEELINGS CANNOT OPERATE TO SUSPEND THE RULE OF LAW.

"[O]ne of the bedrocks of our system of Government is the imperative necessity of a lower Court to follow the mandate or pertinent decision of a higher Court. I will therefore always be bound by and follow any pertinent decision or mandate of the Supreme Court of the United States within its jurisdiction, even though I may disagree one trillion percent with the decision of that Court or the majority thereof." *In re Schlesinger*, 404 Pa. 584, 627, 172 A.2d 835, 855 (1961) (Bell, J., dissenting).

A judge with an agenda inconsistent with that of faithfully applying the law is a threat to the judiciary. It is clear to any thoughtful individual with even a cursory familiarity with the law, that *Amchem*, ***fairly*** read and

honestly applied, is a silver bullet through the heart of the *Ahearn* Global Settlement. As another appellate court wrote in a similar situation, "It is difficult to avoid the conclusion that [the lower court] was simply unhappy with our decision and chose to ignore it." *Davis* v. *Hallett*, 630 P.2d 1, 2 n.2 (Alaska 1981).[5]

The behavior of the Proponents of the settlement and the panel majority on remand seems to suggest that they are new arrivals from some parallel universe[6] in which there was a ***different*** *Amchem* decision from this Court — one which conferred a limitless blessing upon far-reaching global settlement and an expansive reading of Rule 23.

Federal judges are highly intelligent individuals who do not need to be "specifically admonished, in explicit, kindergarten terms, that he is to follow the . . . court's rule. He is expected to know that if he is a lawyer." *State ex rel. Garlovsky* v. *Eastmoore*, 393 So.2d 567, 572 (Fla. App. 1981) (stating same principle for attorneys).

While the Federal Circuit Courts of Appeal are usually, practically speaking, courts of last resort in run-of-the-mill litigation, they are, nevertheless "inferior courts" in the Constitutionally-established hierarchy of the federal system. As the late Judge John R. Brown wrote in sub-headings to the decision in *Bodden* v. *American Offshore, Inc.*, 681 F.2d 319, 321, 326, 1982 AMC 2409 (5th Cir. 1982):

> *When the Supreme Court Talks . . .*
>
> *. . . We Listen*[.]

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5 *Davis* v. *Hallett*, like the instant case, involved a second journey to the higher court where the lower court failed the heed the higher court's mandate handed down after the first appeal.

6 In the words of the court in *Brandt* v. *Schal Associates, Inc.*, 121 F.R.D. 368 (N.D. Ill. 1988),

> Perhaps there exists a parallel universe where "no" means "yes" and "up" means "down" (shades of Orwell's 1984) . . .

121 F.R.D. at 384 (criticizing certain arguments as "surreal").

All tribunals are not created equal. As Justice Jackson wrote in *Brown* v. *Allen*, 344 U.S. 443, 540, 73 S. Ct. 397, 427 (1953) (concurring in the result):

> We are not final because we are infallible, but we are infallible only because we are final.

In the more recent articulation of the rule in *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312, 114 S. Ct. 1510, 1519 (1994), the Court noted that one of its prior decisions established that certain

> prior decisions of the Courts of Appeals . . . were *incorrect*. They were not wrong according to some abstract standard of interpretive validity, but the rules that necessarily govern our hierarchical federal court system. [citation omitted] It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.

This is — or ought to be — a wholly unremarkable proposition to any federal judge. "[W]hen the Supreme Court speaks clearly, we are bound to obey." *Cervantes* v. *Guerra*, 651 F.2d 974, 981 (5th Cir. 1981). Where binding precedent has been established by decision of a higher court, the lower court has "no discretion" to depart therefrom. *Johnson* v. *DeSoto County Board of Commissioners*, 72 F.3d 1556, 1559 n.2 (11th Cir. 1996). *See also United States* v. *Jacobs*, 955 F.2d 7, 9 (2d Cir. 1992) ("The lower court must adhere to the decision of a higher court even where it disagrees or finds error in it.")[7]

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[7] **The point was well made in *Dronenburg* v. *Zech*, 741 F.2d 1388, 1396 n.2 (D.C. Cir. 1984). Judge Bork noted that as an academic he had expressed disagreement with the Supreme Court's creation of "new constitutional rights," rights at issue in the case then before the D.C. Circuit. Judge Bork wrote, "These views are . . . completely irrelevant to the function of a circuit judge. The Supreme Court has decided . . . we are bound absolutely . . ." *Id.* The question, was "whether the Supreme Court has specified a mode of analysis, a methodology, which, honestly applied, reaches the case we must now decide." *Id.***

The duty of a lower court was well-stated many years ago in *RD-DR Corporation* v. *Smith*, 183 F.2d 562, 565 (5th Cir. 1950):

> Our duty is in accordance with the long settled and still controlling principles of judicial decision, despite vigorously announced views of individual judges to the contrary, to determine not how, if we were legislators we would write the law, but how, in accordance with the principles governing judicial decision, including Stare Decisis, and the adjudicated cases, which make up the law, it must be written.

The judicial duty to honor precedent carries with it the duty to do so ***honestly***, with ***good faith***. It is a disservice to the Rule of Law to engage in the sort of sophistry that one of the Fifth Circuit's esteemed jurists criticized as selective application of precedent: "This rule holds only to redheaded Walpoles in pale magenta Buick cars." *Bhandari* v. *First National Bank of Commerce*, 829 F.2d 1343, 1352 (5th Cir. 1987) (Higginbotham, J., concurring opinion, quotation attributed to Karl N. Llewellyn, *The Bramble Bush* [1960]). In that case Judge Higginbotham further wrote that

> As an inferior court we must not allow our version of a "correct" result to deceive us into semantic games of reformulation and hair splitting in order to escape the force of a fairly resolved issue.

Petitioners cannot escape the conclusion that just such an unprofessional "game" was being played on remand from this Court. As the Dissent wrote, "Even if, arguendo, the law that informs this case was not plain before the Court decided *Amchem Products, Inc.* v. *Windsor*, ___ U.S. ___, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), that law is evident now." *Ahearn II* at 671 [A-3].

An inferior court may not "strip content from principle" confining the appellate holding "to the precise

facts before it." 829 F.2d at 1352. *See also United States* v. *Yakubu*, 936 F.2d 936, 939 (7th Cir. 1991) (criticizing "feeble attempt" to distinguish facts from Supreme Court precedent: "The Supreme Court does not sit to decide cases that will control only cases having identical facts.") *Accord*, *Bernbeck* v. *Moore*, 936 F.Supp. 1543, 1558-1559 (D. Neb. 1996) (emphasis added) ("I am required to apply *in good faith* the precedent of the United States Supreme Court whether I agree with that precedent or not.")

The positions taken by the Proponents of the Global Settlement on remand bear witness to the truth underlying the cynicism for lawyers entertained by so many laypeople. In the blunt words of a character depicted by Ryan O'Neal on the silver screen:

> Everybody knows those Big Mules up in Birmingham, and in places up north like Wall Street, hire lawyers full time jus' to show them how to bend the law or sneak aroun' it. There ain't nothin' illegal when it comes to business less'n you got the bad luck to get caught at it.

Joe David Brown, *Paper Moon* 35 (1971). The Proponents of *Ahearn*, it is respectfully submitted, seek not to distinguish *Amchem* in good faith, but rather to "bend the law" articulated in Justice Ginsburg's opinion or "sneak aroun' it."

A jurist's personal vision of some "higher good" is not a warrant to "casually dismiss" the teachings of this Court. As the Dissent wrote:

> The panel majority embraces a settlement that it considers a triumph of practicality. In doing so, it casually dismisses the teaching of *Amchem* and blesses a class that falls far short of legal and constitutional requirements. I do not believe the Supreme Court spoke cryptically in vacating our earlier opinion while articulating, in *Amchem*, the specific standards for us to apply

on remand. Because the majority adheres to an opinion that is foreclosed by the Court's reasoning, I respectfully dissent.

The Proponents of the Global Settlement couched the language of their briefing and argument to the panel to thrust the proposition that this Court's opinion in *Amchem* is effectively a nuisance that only operates to frustrate the ultimate operation of *Ahearn*. With that consideration the subtle strategy was offered to simply overlook and avoid the issues and impact of the case giving rise to the GVR. The panel then carried through to the conclusion of the strategy, by simply penning a five- paragraph memorandum opinion, omitting any substance or semblance of reconciling *Ahearn* with this Court's recent pronouncement, as a way to flout the mandate, and maybe get away with it.

C. AN EXTRAORDINARILY IMPORTANT CASE

The importance of this case to divining the contours of permissible class-action settlements under Rule 23 renders it imperative that the Court grant certiorari a second time, so as to complete the task the lower court has left undone.

"Regardless of what else one can say about *Ahearn*, . . . no one can fairly accuse it of being an ordinary case." *Ahearn I*, Dissent, 90 F.3d at 1021 [A-188]. "Unencumbered by legislative safeguards and shedding nearly every judicial protection, the district court enacted a novel, untested tort reform package. As a result, Fibreboard's victims find themselves guinea pigs in a dubious (and legally unfounded) experiment." *Id.* at 1026 [A-199].

Judge Smith's *Ahearn I* dissent highlights the precedent-setting importance of *Ahearn*, an importance the which both *Ahearn I* and *II* majority opinions purposefully ignored:

> This case is extraordinarily important. Prior to the filing of this suit, no one had ever attempted a no-opt-out, mass-tort, settlement-only, futures-only class action. Ever since the district court's certification order, however, corporate America has been "anxiously awaiting" a decision in this case. Richard B. Schmitt, The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit, WALL ST.J., July 18, 1996, at A1. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map[8] for sheltering their assets and improperly restricting the rights of their present and future victims." Amicus Br. of Trial Lawyers for Public Justice at 2-3.

Ahearn I, Dissent, 90 F.3d at 994 [A-128].

Indeed, this case is infamous. As one commentator wrote:

> Just a few years ago, it seemed that judges could resolve even the most complicated mass-injury cases with a single stroke of the pen. Settlements covering thousands of people — known as class actions — and involving products ranging from pickup trucks to heart valves regularly grabbed headlines. It seemed so easy that, in a big asbestos case, one federal judge in Texas loaded the lawyers on both sides into a van, drove them to his house and plied them with food and drinks until they came to terms.

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8 That "road map" leads unerringly to the Fifth Circuit, and will — if left unaltered — lend a new meaning to the term "forum shopping" (dare we say "dumping ground"). As every first-year law student knows, "the search for the forum with the most advantageous governing law lies at the very heart of the notion of forum-shopping." *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 794 n.105 (D.C. Cir. 1980).

Richard B. Schmitt, *Thinning the Ranks: Diet-Pill Litigation Finds Courts Frowning On Mass Settlements*, Wall St. J. (Jan. 8, 1998) (referring obliquely to the facts of *Ahearn*).

While the majority panel decision ignores the importance of its holdings, *Ahearn's* dramatic implications for the world of mass-tort are clear to the thoughtful legal mind. After a brief moment of clarity in the wake of this Court's *Amchem* decision, lawyers and corporate defendants with a pecuniary interest in such a legal gray area can be expected to play to the hilt the argument that the Fifth Circuit is a safe harbor from the teachings of *Amchem*. As one very recent commentary states, "The *Amchem* decision may have tossed cold water on mass tort ADR, but *Ahearn* may reignite the controversy." John Gibeaut, *At the Crossroads*, 84 A.B.A.J. 60 (March 1998).

As the only Court which can establish national standards for mass-tort settlements, this Court has a duty to see that the Fifth Circuit panel's decision does not "reignite" the controversies that *Amchem* was intended to resolve.

D. FEELINGS OF DISQUIET ABOUT THE COVERAGE CASE CANNOT SUPPLY THE REQUISITE COMMON ISSUES.

In its terse *Ahearn II* opinion, the panel majority stated that "All members of the class, and all class representatives, share the common interests: suffering harm from asbestos exposure and seeking equitable distribution of compensation from limited funds." [A-2] This, concludes the majority, is sufficient under Rule 23(a). But this conclusion was reached without benefit of principles of *Amchem*.

Rule 23 requires commonality in questions cognizable as matters of law. As Justice Ginsburg wrote in *Amchem*:

> We address first the requirement of Rule 23(b)(3) that "[common] questions of law or fact . . . pre-

> dominate over any questions affecting only individual members." The District Court concluded that predominance was satisfied based on two factors: class members' shared experience of asbestos exposure and their common "interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F.R.D. at 316. The settling parties also contend that the settlement's fairness is a common question, predominating over disparate legal issues that might be pivotal in litigation but become irrelevant under the settlement.
>
> The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos- exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, see *supra*, at 2237-2238, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement.

Amchem, 117 S. Ct. at 2249. In a footnote to the quoted passage, this Court stated explicitly that this teaching was not limited solely to Rule 23(b)(3):

> In this respect, the predominance requirement of Rule 23(b)(3) is similar to the requirement of Rule 23(a)(3) that "claims or defenses" of the named representatives must be "typical of the claims or defenses of the class." The words "claims or defenses" in this context — just as in the context of Rule 24(b)(2) governing permissive intervention — "manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending

> law suit." Diamond v. Charles, 476 U.S. 54, 76-77, 106 S. Ct. 1697, 1711, 90 L. Ed. 2d 48 (1986) (O'CONNOR, J., concurring in part and concurring in judgment).

Id. at 2249 n.18.

In their briefing on remand, and at the oral argument, counsel for the Proponents of the Global Settlement were forced to concede as much. Counsel for Continental Insurance Company admitted that "the settlement cannot supply the requisites of commonality and typicality. And that is the teaching of the Supreme Court in *Amchem*." [A-59] The attorney for class counsel admitted that the only common issue the Settling Parties can assert is "risk posed by the coverage litigation." [A-45, quoting District Court's opinion]. "That was what this case was about." [A-46] He repeated the assertion:

> This court at 90 Fed 3d 976 held the named plaintiffs settled *Ahearn* because of their desire to avoid the risks of insurance coverage litigation and to ensure that money remains available to pay their claims when they make it through the settlement and/or trial process to final judgment.
>
> That's what this was about.

[A-46]. This litany of "common issues" has been reiterated over and over, by the district court, by the counsel for the Proponents of the Global Settlement, and by the panel majority in the Fifth Circuit. No matter how oft-repeated, the litany cannot surmount the requirements of Rule 23(a); they beg the question posed by *Amchem*. These are not "legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Amchem, supra*. Fears about the outcome of the Coverage Case — litigation to which the class members were strangers — do not fill the bill for "legal or factual questions that qualify each class member's case as a genuine contro-

versy." Those questions concern the class member's asbestos-related claim against Fibreboard — not inchoate fears about whether a judgment against Fibreboard could be enforced. As the cogent *Ahearn II* Dissent observes, it is

> apparent that the panel majority based its finding of commonality solely on the now-discredited theory that the class members' interest in the settlement itself is sufficient to fulfill rule 23's commonality requirement.

Ahearn II Dissent at 682 [A-29]. In a footnote to the quoted passage, the Dissent pointed out:

> The common issues described by the district court and the first panel opinion are remarkably similar to one of the common issues relied on by the *Amchem* district court and squarely rejected by the Supreme Court: "their common 'interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system.'" *Amchem*, ___ U.S. at ___, 117 S. Ct. at 2249 (quoting *Georgine* v. *Amchem Prods., Inc.*, 157 F.R.D. at 316). This benefit, the Court held, "is a matter fit for legislative consideration, but *it is not pertinent* to the predominance inquiry." Id. (emphasis added).

Id. at 682 n.31 [A-29]. This absence of common issues dooms *Ahearn* for the same reason the *Amchem* settlement could not stand.

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E. THE SAME INTRA-CLASS CONFLICTS WHICH CONSIGNED THE *AMCHEM* GLOBAL SETTLEMENT TO OBLIVION ARE FATAL TO THE *AHEARN* SETTLEMENT.

In *Amchem* this Court agreed with the Third Circuit that "serious intra-class conflicts preclude[d] th[e] class from meeting the adequacy of representation requirement" of Rule 23(a)(4). The Court wrote:

> As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.

117 S. Ct. at 2251.

> The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency.

Id.

There is no principled way to distinguish the Global Settlement. Every fact set forth by Justice Ginsburg with respect to the CCR plan is equally true for *Ahearn*. Indeed, the conflict is more egregious in the instant "limited fund" case.[9] The CCR settlement fund was sub-

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[9] Petitioners note and renew their objection that *Ahearn* does not present a true limited fund. The Global Settlement, however, *is* limited in the sense that it contemplates that the guilty parties walk away with no obligation to the future injured, no matter how wide of the mark the projections are as to future liability.

ject to future replenishment, at least in theory. The Global Settlement is not. The "tug" between interests pulls with even greater urgency. In the absence of proper subclassing, the Global Settlement must fail for this reason alone.

F. *AMCHEM* CONDEMNS THE GLOBAL SETTLEMENT AS IMPERMISSIBLE, JUDICIALLY-LEGISLATED TORT REFORM.

Amchem recognizes, as did the Dissent in *Ahearn I*, that

> Real reform, the report concluded, required federal legislation creating a national asbestos dispute-resolution scheme. See *id.*, at 3, 27-35; see also *id.*, at 42 (dissenting statement of Hogan, J.) (agreeing that "a national solution is the only answer" and suggesting "passage by Congress of an administrative claims procedure similar to the Black Lung legislation"). As recommended by the Ad Hoc Committee, the Judicial Conference of the United States urged Congress to act. See Report of the Proceedings of the Judicial Conference of the United States 33 (Mar. 12, 1991). To this date, no congressional response has emerged.[10]

117 S. Ct. at 2237.

> In the face of legislative inaction, the federal courts — lacking authority to replace state tort systems with a national toxic tort compensation

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10 **This is a familiar refrain amongst the judiciary — indeed, at least one member of the *Ahearn I* panel has been publicly so quoted. "I do not think there's a way to get at this [the national asbestos case backlog] without legislative and rule changes." Gordon Hunter, *Rehnquist Redirects Attack on Asbestos Docket Backlog; New Panel replaces Class Action Tactic*, Texas Lawyer, Oct. 8, 1990 (quoting Judge Reavley, Chairman of Ad Hoc Committee on Asbestos Litigation).**

> regime — endeavored to work with the procedural tools available to improve management of federal asbestos litigation.

Id. The Court, while explicitly acknowledging the asbestos phenomenon as a "crisis," underscored that the lower federal courts must indeed work with the *tools available*, and not devise new ones outside the law as written:

> And, of overriding importance, courts must be mindful that the rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U.S.C. §§ 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge . . . any substantive right." § 2072(b).

117 S. Ct. at 2248. *See also* 117 S. Ct. at 2249 ("The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration").

> The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it. As this case exemplifies,

> the rulemakers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste." C. Wright, Law of Federal Courts 508 (5th ed. 1994); cf. 83 F.3d, at 634 (suggesting resort to less bold aggregation techniques, including more narrowly defined class certifications).

The warnings given by the Dissent in *Ahearn I* clearly are accepted and underscored by this Court in *Amchem*. Judicial frustration with Congressional inaction does not give the judiciary a jurisdictional blank check; "judicial inventiveness" is limited by the pre-existing law. So-called "tort reform," if it is to come, must come from the legislature, and not from a single judge, or group of judges, who have an agenda.

G. THE PANEL'S ULTRA-BRIEF PER CURIAM OPINION DOES NOT DISCHARGE ITS DUTY TO ENGAGE IN REASONED RECITATION ON REMAND.

As the Dissent points out, the five-paragraph unsigned opinion does not even fill a full page in the Federal Reporter. "I believe the remand in this immensely important case merits more thorough consideration than is reflected in the majority's terse per curiam treatment." *Ahearn II*, Dissent, 134 F.3d at 670 [A-4][11] The extreme brevity and lack of analysis by the panel majority is an insult to the importance of this case, the difficulty of the issues it presents, and the hundreds of thousands of class members whose rights stand or fall upon its final outcome.

On remand, even the Proponents of the Global Settlement stated that part of the rationale for any GVR dis-

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[11] **The kindest adjective that has been applied to the per curiam opinion is "brisk" (Rex Bossert, *Asbestos Case Deepens Rift In 5th Circuit*, National Law Journal, Feb. 16, 1998).**

position is that this Court does not wish to give a case plenary consideration where "they have not had the benefit of the Court of Appeals determination itself of the issue." [A-56] (statement by counsel for Continental Casualty). *See Lawrence* v. *Chater*, ___ U.S. ___, 116 S. Ct. 604 (1996) (noting that a GVR order "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits").

As one esteemed jurist wrote in *Loughney* v. *Hickey*, 635 F.2d 1063, 1068 (3d Cir. 1980) (Aldisert, J., concurring):

> In all cases of institutional or precedential consequence, the courts have a duty of reasoned elaboration . . . .

Similarly, in *United States* v. *Fisher*, 55 F.3d 481, 487 (10th Cir. 1995), the appellate tribunal criticized the lower court for its failure to elaborate on the reasons for a decision:

> In failing to state his reasons, the judge has, once again, left us in an unwelcome zone of speculation. Judicial action is not an exercise in *ipse dixit* — the bare assertion of any individual resting not on expressed reason, but merely on the authority vested in an office. According, when a judge takes action, it is fundamental that a basis grounded in law is articulated.

See also N.L.R.B. v. *Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970) (articulated discussion of factors which lead court to one rather than to another result gives strength to the system and reduces, if not eliminates, easy temptation or tendency to ill-considered or even arbitrary action by those having awesome power of almost final review; rule permitting disposition without opinion must be used sparingly and must never be used to avoid difficult or troublesome decision or to conceal divisive or disturbing issues). *United States* v. *North*, 910 F.2d 843, 881 (D.C. Cir. 1990) ("the very premise of appellate review is

that reasoning matters"), *superseded in part as to other issues on rehearing*, 920 F.2d 940 (1990), *cert. denied*, 500 U.S. 941 (1991).

It is ancient learning that "justice must not only be done but must manifestly be seen to be done . . . ." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring). The opinion of the majority panel below is so manifestly insufficient that this Court must conclude that — for whatever reasons — the majority panel below is simply unwilling to apply *Amchem* wholeheartedly. To correct this intolerable state of affairs a writ of certiorari must be granted.

CONCLUSION

In its original approval, the District Court was well aware that the legal efficacy of the Global Settlement was still to be pondered; still to be seen whether Rule 23 saves the day for it. *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505, 508 (E.D. Tex. 1995). Nearly five years have passed since this class action commenced. The Flanagan Petitioners, at great labor and expense, have climbed the rungs of the appellate ladder to the top. As to the question posed by the district court, it is answered by this Court in *Amchem*, and answered resoundingly in the negative.

This Court in *Amchem* has made strides in class action policy and has interpreted Rule 23 with meaningful guidelines in its operative features. If *Ahearn* is to stand, as the majority panel in the court below has decreed, then it will work to impede and indeed confuse the meaning and efficacy of the policy and jurisprudence set forth in *Amchem*. If *Ahearn* is reversed, and the reasoning of the dissent upheld, this case will act to augment the *Amchem* decision with vivid clarity and legal certainty. To grant the writ of certiorari is to

round off the uncertainties that otherwise would abound; to deny the writ would leave the state of applicable jurisprudence in a quandary.

Respectfully submitted,

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Dated at Detroit, Michigan
this 13th day of April, 1998.

Supreme Court, U.S.
FILED

971695 APR 14 1998

OFFICE OF THE CLERK

No. _____

In The Supreme Court of the United States

October Term, 1997

IN RE ASBESTOS LITIGATION:

JAMES FLANAGAN AND DAVID H. MIDDLETON,
Petitioners,

v.

GERALD AHEARN; JAMES MCADAMS DENNIS; CHARLES W. JEEP; JAMES DRAKE; JUANITA DRAKE; JAMES ELLISON; ROLAND DEARBORN; JUDITH DEARBORN; KERWIN BUTCHER; DIR., WORKERS COMP., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; PAUL COCHRAN; IDA BECK; MARION BEHEE; LONGSHORE INTERVENOR; WILLIAM JAMES MITCHELL; FIBREBOARD CORPORATION; BETHLEHEM STEEL CORPORATION; CONTINENTAL CASUALTY COMPANY; PACIFIC INDEMNITY; FRANCIS MCGOVERN; OWENS-ILLINOIS, INC.; PENN MUTUAL LIFE INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; CNA CASUALTY COMPANY OF CALIFORNIA; CELOTEX CORPORATION; DANIEL HERMAN RUDD, JR., ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; JOHN HANSEL, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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- VOLUME I -

• • •

OPINION

(CITE AS: 134 F.3d 668)

(United States Court of Appeals — Fifth Circuit)

(Dated January 27, 1998)

(IN RE ASBESTOS LITIGATION, James FLANAGAN, David H. Middleton, Edee Cochran, Esteban Yanez Ortiz, John R. Allgood, Henry William Evers, Lester Eugene Taylor and Safety National Casualty Corporation, Appellants, v. Gerald AHEARN, James McAdams Dennis, Charles W. Jeep, James Drake, Juanita Drake, James Ellison, Roland Dearborn, Judith Dearborn, Kerwin Butcher, Dir., Workers Comp., Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor, Paul Cochran, Ida Beck, Marion Behee, Longshore Intervenor, William James Mitchell, Fibreboard Corporation, Bethlehem Steel Corporation, Continental Casualty Company, Pacific Indemnity, Francis McGovern, Owens-Illinois, Inc., Penn Mutual Life Insurance Company, Columbia Casualty Company, CNA Casualty Company of California, Celotex Corp., Daniel Herman Rudd Jr., on behalf of themselves and others similarly situated, John Hansel, on behalf of themselves and others similarly situated, Appellees — No. 95-40635; Appeals from the United States District Court for the Eastern District of Texas)

Before: REAVLEY, DAVIS and SMITH, Circuit Judges.

PER CURIAM

In our prior opinion, we affirmed the judgment below, which approved class action settlements of asbestos-related claims involving Fibreboard Corporation. *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), vacated, ___ U.S. ___, 117 S.Ct. 2503, 138 L.Ed.2d 1008 (1997). The Supreme Court vacated our judgment and remanded the

case for reconsideration in light of *Amchem Products, Inc.* v. *Windsor*, ___ U.S. ___, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). After oral argument and reconsideration, we can find nothing in the *Amchem* opinion that changes our prior decision. We again affirm.

There are two controlling differences between this case and *Amchem*. First, this class action proceeded under Rule 23(b)(1); *Amchem* was a Rule 23(b)(3) case. Second, there was no allocation or difference in award, according to nature or severity of injury, in the present case as there was in *Amchem*; in the case here all members of the future claimant class are treated alike. Individual damage awards will subsequently be decided according to individual damages.

The district court made extensive findings and found, specifically, that separate actions by members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. The language of the district court matches the language of Rule 23(b)(1)(B). No one has contested that finding of the district court, probably because it is incontestable.

The Supreme Court stated in *Amchem* that a settlement class action, like all federal class actions, cannot proceed unless the requirements of Rule 23(a) are met, irrespective of whether the proposed settlement is deemed fair under Rule 23(e). We detailed in our prior opinion our agreement with the thorough study and conclusions by the district court, satisfying the requirements of class certification under Rule 23(a). All members of the class, and all class representatives, share the common interests: suffering harm from asbestos exposure and seeking equitable distribution of compensation from limited funds. None of the uncommon questions, abounding in *Amchem*, exist in the present case.

The only conflict between members of the future claimant class could be competition for larger and earlier shares of available money, but that is precisely the reason for Rule 23(b)(1)(B) and the problem it is designed to solve where the money is limited. That conflict or competition is controlled for the benefit of all members of the class. It follows that the lawyer representing the class serves only common interests of the class.

The judgment of the district court is AFFIRMED.

JERRY E. SMITH, Circuit Judge, dissenting:

In a five-paragraph unsigned opinion, the panel majority states that "we can find nothing in the *Amchem* opinion that changes our prior decision."[1] Like that prior decision, the new majority opinion overrides the substantive and procedural rights of large groups of asbestos claimants. Because this court cannot properly bless a settlement that Congress has not authorized and the Constitution forbids, I respectfully dissent.

I.

Even if, arguendo, the law that informs this case was not plain before the Court decided *Amchem Prods.* v. *Windsor*, ___ U.S. ___, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), that law is evident now. It is not surprising that the Court issued a "GVR"[2] requiring this court to recon-

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1 In published form, the majority opinion will consume only about a page. Accordingly, I will not burden the reader with page references.

2 The acronym "GVR" refers to the Supreme Court's practice of granting certiorari, vacating, and remanding for further consideration in light of some intervening development. The practice is thoroughly explained in *Lawrence* v. *Chater*, 516 U.S. 163, 165-75, 116 S.Ct. at 604, 605-10, 133 L.Ed.2d 545 (1996) (*per curiam*). See *Carter* v. *Johnson*, 131 F.3d 452, 457 n.2 (5th Cir. 1997).

sider the majority's now-vacated opinion[3] in light of *Amchem*. The Court issues a GVR order "[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration . . . ." *Lawrence*, 516 U.S. at 167, 116 S.Ct. at 607. I believe the remand in this immensely important case merits more thorough consideration than is reflected in the majority's terse *per curiam* treatment.

II.

Like the district court *a quo*, the district court in *Amchem* had approved a gigantic settlement, including a complex scheme for processing claims administratively, in an effort to achieve efficiency and fairness in the resolution of massive numbers of asbestos claims without resort to individual trials.[4] The *Amchem* Court rejected the settlement because it plainly is not authorized by the applicable rules and statutes:

> The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And [Fed. R. Civ. P.] 23, which must be interpreted with fidelity to the Rules Enabling Act [, 28 U.S.C. § 2072(b),] and applied with the interests of absent class members in close view, cannot carry the large load . . . the

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3 See *Flanagan* v. *Ahearn (In re Asbestos Litig.)*, 90 F.3d 963 (5th Cir. 1996) ("*Ahearn I*"), vacated, ___ U.S. ___, 117 S.Ct. 2503, 138 L.Ed.2d 1008 (1997).

4 For a recitation of the facts and proceedings, the reader is referred to the prior panel majority and dissenting opinions in this case. See *Ahearn I*, 90 F.3d at 968-74; *id.* at 993-98 (Smith, J., dissenting).

> District Court heaped upon it. As this case exemplifies, the rulemakers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste."

___ U.S. at ___, 117 S.Ct. at 2252 (footnote and citation omitted, last three brackets in original).

The lesson is that, regardless of the benefits a particular settlement might seem to confer, in terms of "the greatest good for the greatest number" of parties, the niceties of statutory and constitutional constraints must be observed. Thus, while parties and district courts can be praised for their resourcefulness in formulating settlements that resolve mass tort litigation, the statutory and constitutional constraints, as the *Amchem* Court observed, "serve to inhibit appraisals of the chancellor's foot kind — class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248.

This general theme, expressed forcefully in *Amchem*, is reinforced by the Court's discussion of specific issues, most of which are highly relevant to the instant case. While *Amchem* focuses on the issues of predominance and adequacy of representation, the Court emphasizes that these are not the only considerations a court must address when certifying a settlement class.[5]

III.

Before discussing the issues dealt with directly in *Amchem*, I note that this is not, as the majority

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[5] See, e.g., *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2252 ("Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here . . . . [H]owever . . . we recognize the gravity of the question . . . .").

would have it, a "limited fund" case. I will show, below, that the majority's analysis is fatally flawed even if we treat this matter as involving a limited fund — a question not present in *Amchem* — but I adhere to my previously-stated view that Fibreboard and its insurers do not collectively constitute a "limited fund" that would allow class certification under Fed. R. Civ. P. 23(b)(1)(B). See *Ahearn I*, 90 F.3d at 1002 n.17 (Smith, J., dissenting).

This issue alone should be dispositive of the matter, for if this class cannot go forward as a "limited fund" class, it would require certification under rule 23(b)(3) and would then be subject to the requirements of predominance and superiority. *Amchem* would specifically prevent class certification, for here, we have precisely the same disparities that destroyed cohesion in the *Amchem* class:

> "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma. . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> "The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories."

Amchem, ___ U.S. at ___, 117 S.Ct. at 2250 (quoting *Georgine* v. *Amchem Prods.*, 83 F.3d 610, 626 (3d Cir.

1996)). In *Amchem*, as here, differences in state law compound these disparities. *Id.*

The panel majority concludes that the district court's finding that Fibreboard is a "limited fund" is "incontestable".[6] This is error, for rule 23(b)(1)(B) cannot reasonably be read to allow a "limited fund" class where, as here, there is and was no "fund" except that which was established by the settlement itself.[7] Congress long ago established a comprehensive bankruptcy scheme to govern situations in which a company is unable to pay its debts. Here, the district court speculated that, at some point in the future, Fibreboard may be unable to pay all of its asbestos tort creditors. The court then, in effect, discharged the debt owed that particular class of creditors while avoiding the procedural protections of the bankruptcy code. This is manifestly incorrect.

Courts have been confronted with at least two different theories under which rule 23(b)(1)(B) would apply to cases that do not fit into this "limited fund" paradigm: the "constructive bankruptcy" and the "punitive damage overkill" theories. See Arthur R. Miller and David Crump, *Jurisdiction and Choice of Law in Multistage Class Actions after* Phillips Petroleum Co. *v.* Shutts, 96 YALE L.J. 1, 42 (1986). The instant putative class

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6 The panel majority's statement that "[n]o one has contested that finding of the district court" is simply inaccurate: Briefs in the original appeal and on remand vigorously contest the "limited fund" characterization.

7 Rule 23(b)(1)(B) does not mention a "limited fund" but, instead, allows class certification where individual adjudications "would as a practical matter . . . substantially impair" the ability of class members to protect their interests. Thus, the class members' interests might be in mineral reserves, water rights, or a fixed amount of money. The rule necessarily contemplates the allocation of a limited resource, however, for only where the class members' interests are to some degree mutually exclusive will the individuals' litigation "substantially impair" the others' rights. Thus, where the remedy sought is money damages, the paradigm is of a "limited fund" to be distributed for the class members' benefit.

seeks certification on the basis of "constructive bankruptcy." That is, the claimants theorize that if Fibreboard continues to pay asbestos settlements and judgments, it will eventually go bankrupt, and this, as a practical matter, will dispose of later-brought claims.

A.

The panel majority gives great deference to the district court's factual finding that the maintenance of individual actions by class members might be dispositive of the interests of other parties. The majority accurately notes that "the language of the district court matches the language of Rule 23(b)(1)(B)," but the enunciation of these magic words cannot insulate the underlying legal determination from review, any more than would a trial court's factual finding that a defendant is liable. As a matter of law, this "finding," which is overtly conclusory, is incorrect.

The class proponents cite cases in which appellate courts have upheld "limited fund" class certifications under rule 23(b)(1)(B), but these cases invariably involve a "fund" that, unlike an ongoing concern, is necessarily limited.[8] These applications of rule 23(b)(1)(B) are appropriate, for the rule obviously applies where "claims are made by numerous persons against a fund

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8 For example, in *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (2d Cir. 1992), *modified on reh'g sub nom. In re Findley*, 993 F.2d 7 (2d Cir. 1993), the underlying trust fund had been established during the asbestos defendant's bankruptcy reorganization. It was entirely proper, then, for the claims against that fund to be litigated en masse as a "limited fund" class. In *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), the defendant had established a $350 million fund in settlement of an SEC enforcement action, and subsequently went bankrupt. This, also, involved an actual "fund" that was "limited". And in *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 35 S.Ct. 692, 59 L.Ed. 1165 (1915), there was a true "fund" against which the individual causes of action arose: a mortuary fund held by Hartford for the benefit of thousands of members.

insufficient to satisfy all claims."[9] Professor Newberg states:

> A limited fund exists when a fixed asset or piece of property exists in which all class members have a preexisting interest . . . . Classic illustrations include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime suit, and others.

1 NEWBERG ON CLASS ACTIONS §4.09, at 4-33 (emphasis added). Here, there is neither a fixed asset nor property in which the putative class members have an interest. Their claims are made not against a "fund", but against Fibreboard itself.

It is fundamental that an injured party has an *in personam* claim against the person responsible for his injury.[10] Such a claim is not limited by the amount of insurance carried by a defendant, nor by its liquid assets or net worth. A final judgment against the defendant becomes much like any other debt, able to be collected from any of a defaulting debtor's existing or after-acquired assets.[11]

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9 Rules Advisory Committee, *Notes to 1966 Amendments to Rule 23*, 39 F.R.D. 69, 101; see also 1 NEWBERG ON CLASS ACTIONS § 4.09, at 4-31 (noting that "the most common use of subsection (b)(1)(B) class actions is in limited fund cases")

10 Take, as a random example, the admiralty case of *Grubart* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995), in which the contested issue was whether the Limitation on Vessel Owners' Liability Act, 46 U.S.C. § 181 *et seq.*, should apply. If it did, all the victims of the Chicago flood would be limited in their recovery to the value of a few marine vessels; but if it did not, the victims of the flood could recover *in personam* against the defendant and its insurers. See Grubart, 513 U.S. at 531, 115 S.Ct. at 1047.

11 Also, as I note below in part III.B, Fibreboard has been purchased by Owens-Corning, whose assets could be available, in

(*concluded on page A-10*)

Here, the panel majority has approved replacing the claimants' state law causes of action *in personam* with a claim against an artificially-imposed "limited fund." To be sure, the settlement does establish a limited fund: a res from which payment for all claims must be distributed. Indeed, for Fibreboard, the entire point of this settlement was to obtain a limit on liability that theretofore had been, quite literally, limitless. But that does not transform the plaintiffs' *in personam* claims against Fibreboard into *in rem* claims against the newly-established fund.

It is possible that the mounting costs of defending asbestos claims and paying asbestos judgments would have driven Fibreboard to take refuge in bankruptcy court.[12] This would be unfortunate for Fibreboard's shareholders and contract creditors, but it would not be catastrophic: The Johns-Manville Corporation went through an apparently successful bankruptcy reorganization and spun off the Manville Personal Injury Settlement Trust in order to satisfy its tort liabilities. See *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d at 725. And in any case, the specter of eventual bankruptcy does not now render this ongoing concern a "limited fund." Up until the time of a bankruptcy discharge, tort creditors have a legally unlimited font of money from which they may demand their due.

(*continued from page A-9*)

appropriate circumstances, to satisfy tort judgments. Finally, Fibreboard has announced that it is suing the tobacco industry for recovery in the nature of contribution, arguing that injuries caused by smoking aggravate injuries caused by asbestos. See *Asbestos Maker Sues Tobacco Industry*, N.Y. TIMES, Nov. 8, 1997, at D5. Any sums thus recovered will be available to pay tort judgments.

12 I note the indeterminacy inherent in this speculation: At what point does a "fund" become "limited"? A district court must assess the probability and likely amount of the claimants' recovery, and balance this against its estimation of the defendant's future ability to pay.

This proposed settlement class is in fact "a self-evident evasion of the exclusive legal system established by Congress for debtors to seek relief."[13] But here, the "constructive bankruptcy" is reached without the protections of the Bankruptcy Code: procedural protections — such as the creditors' vote on settlements — and substantive protections — such as tort creditors' preferred status. It is, moreover, a colossal bailout for Fibreboard's shareholders that would not occur in bankruptcy. Instead of approving this evasion of the mechanisms established by the legislative branch, we should be mindful that "the function of federal courts is not to conduct trials over whether a statutory scheme should be ignored because a more efficient mechanism can be fashioned by judges." *In re Keene*, 14 F.3d at 733.[14]

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13 See *In re Keene Corp.*, 14 F.3d 726, 732 (2d Cir. 1993), in which the court noted:

> Indeed, the process contemplated by [class proponents] mirrors a bankruptcy proceeding. The finding of a limited fund corresponds to a finding of insolvency. The preliminary injunction serves much the same function as the automatic stay under Section 362(a) of the Bankruptcy Code. 11 U.S.C. § 362(a) (1988). The class representatives correspond to creditors' committees in Chapter 11 proceedings. See 11 U.S.C. § 1102 (1988). The proposed mandatory class settlement mirrors a reorganization plan and "cram-down," see 11 U.S.C. § 1123, 1129(b), followed by a discharge, 11 U.S.C. § 1141(d).

Id. at 732 (citation omitted).

14 Commentators have questioned the propriety of using rule 23(b)(1)(B) as a means of avoiding bankruptcy proceedings. See, e.g., 3 NEWBERG ON CLASS ACTIONS § 17.15A, at 3S-16 (3d ed. Supp. 1994) (opining that "a 23(b)(1)(B) class should not serve as a substitute for bankruptcy proceedings"); see also, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of Mass Tort Class Actions*, 95 COLUM. L. REV. 1343, 1382-83, 1458-59 (1995); Richard Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 880-81 (1995); William Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 840 (1995).

The panel majority thus supplants the bankruptcy law with a judge-made system to extinguish the rights of tort creditors. And the panel ignores the obvious application of rule 23(b)(1)(B), which does not allow a defendant to limit its substantive liability through the creation of a limited fund — as was done here — but rather is a mechanism for the equitable distribution of a pre-existing fund.

But perhaps most striking is the panel's apparent disregard for principles of federalism and the limits of the Rules Enabling Act. Contrary to the Congressional mandate that the rules of civil procedure not "abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072, this court now takes away state law rights of those who have been damaged in tort and allows the asbestos victims only a pro-rata share in an artificially-limited settlement fund. As a matter of law, this class cannot be certified under rule 23(b)(1)(B).

B.

Even assuming, arguendo, that rule 23(b)(1)(B) allows certification of a "limited fund" class of *in personam* claimants against a solvent ongoing concern and its solvent insurers, the panel majority erred in accepting the district court's factual decision that this is a limited fund. Fibreboard was recently acquired by Owens-Corning in a tender offer for about $515 million cash, plus $85 million of assumed debt. See Andrea Puchalsky, *Owens-Corning to Buy Fibreboard for $515 million*, WALL ST. J., May 29, 1997 at A4. This stands in contrast to the district court's finding, upheld by this court, that Fibreboard was worth no more than $235 million.

This discrepancy could indicate clear error, but at the very least it calls for a remand for new fact finding as to the value of Fibreboard as a potentially "limited fund." By issuing its new opinion, the majority declines, by implication, to permit the district court to reconsider that finding.

IV.

Although the Supreme Court's remand was specifically for reconsideration in light of *Amchem*, the instant matter has the procedural posture of an appeal from the entirety of the district court's judgment. In other words, the remand does not limit the scope of our review. Accordingly, I reiterate, briefly, some of the other points discussed in the original panel opinion and dissent, simply to indicate that these are still live issues important to our consideration.

For example, even if it were properly certified under rule 23(b)(1)(B), this class cannot proceed as a mandatory class in contravention of *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985). See *Ahearn I*, 90 F.3d at 1001-06 (Smith, J., dissenting). Moreover, this class — which by definition includes persons unaware of any injury or even exposure[15] — could never meet rule 23's requirement of notice to class members. See *Ahearn I*, 90 F.3d at 999-1000 (Smith, J., dissenting); see also *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2252 (citing the *Ahearn I* dissent with approval). Perhaps most importantly, this class — with legions of members who lack legally cognizable claims, and many members who have not even suffered injury-in-fact — cannot meet the irreducible minimum standards of justiciability under U.S. CONST. Art. III.[16] See *Ahearn I*, 90 F.3d at 1015-26 (Smith, J., dissenting); see also *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2244 (declining to reach jurisdictional issues before deciding "logically antecedent" rule 23 certification issues).

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15 **Indeed, the class includes "persons" — the future children of persons exposed to asbestos — who had not yet been conceived at the time the complaint was filed.**

16 **Again, I call attention to the "future children" and "future spouses" categories of claimants. See *Ahearn I*, 90 F.3d at 1018-19 (Smith, J., dissenting).**

V.

Even if these reasons were invalid, this class must fail under *Amchem* because of the lack of common issues and the inadequately-representative named plaintiffs. The *Amchem* settlement class, similarly, failed to meet the "adequacy of representation" requirement of rule 23(a). *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2252. The Court stated:

> Nor can the class . . . satisfy Rule 23(a)(4)'s requirement that the named parties will fairly and adequately protect the interests of the class. The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. [A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.
>
> . . . In significant respects, the interests of those within the single [*Amchem*] class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.

___ U.S. at ___-___, 117 S.Ct. at 2250-51 (citations and internal quotation marks omitted).

A.

The *Amchem* Court firmly established three principles of law with respect to rule 23(a)(4). Perhaps most importantly, adequacy of representation must be analyzed as a procedural safeguard — a "structural assurance" that the class members' interests are protected, irrespective of the fairness of the outcome.[17] Id. at ___,

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17 Of great importance here is a point recognized by the panel majority, that a settlement class "cannot proceed unless the require-

(*concluded on page A-15*)

117 S.Ct. at 2251. And it is the class representatives who matter: the named plaintiffs, not their lawyers. Furthermore, the Court's treatment of the issue makes plain that the adequacy of representation — or its converse, the existence of conflicts — is treated as a question of law, not as a factual matter to be proven by expert testimony.

1.

The *Amchem* Court was presented with a factual "no conflict" finding similar to the district court's finding in this case. The same legal ethics expert who testified in *Ahearn* testified in *Amchem* that he perceived no intra-class conflict, or that if there was a small conflict it was overwhelmed by the commonalities. See *Georgine* v. *Amchem Prods., Inc.*, 157 F.R.D. 246, 297-98 (E.D.Pa. 1994). The district court agreed. Id. In their briefs, the class proponents vigorously argued the factual "no conflict" determination to the Supreme Court. See, e.g., *Amchem* Brief for Petitioner at 45-49, 1996 WL 721641, at *45-49.

But the Supreme Court disregarded the expert's testimony and the *Amchem* district court's extensive findings of fact on the issue of representativeness. Cf. *Amchem*, ___ U.S. at ___-___, 117 S.Ct. at 2250-52. Instead, from its own review of the various and potentially adverse interests among class members, the Court determined that conflicts existed — without regard to the conclusions of expert witnesses or of the district

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ments of Rule 23(a) are met, irrespective of whether the proposed settlement is deemed fair under Rule 23(e)." See also *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248 (holding that the fairness inquiry is "an additional requirement, not a superseding direction" to the requirements of Rules 23(a) and (b)). This directly contradicts *Adams Extract Co.* v. *Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195 (5th Cir. Apr. 1981). See, e.g., *id.* at 212 ("If the [settlement] terms themselves are fair, reasonable and adequate, the district court may fairly assume that they were negotiated by competent and adequate counsel").

court. It is thus apparent from *Amchem* that the existence of conflicts is very much a question of law, not fact.[18]

As did the *Amchem* district court, however, the district court and panel majority here incorrectly have treated the conflict inquiry as a factual one. In *Ahearn I*, the majority stated that "[j]ust what measure of representation is adequate is a question of fact that depends on each peculiar set of circumstances." 90 F.3d at 977 (quoting *North Am. Acceptance Corp.* v. *Arnall, Golden & Gregory*, 593 F.2d 642, 644 n.4. (5th Cir. 1979)). The new majority opinion apparently draws on that conclusion when it says that "[w]e detailed in our prior opinion our agreement with the thorough study and conclusions by the district court, satisfying the requirements of class certification under Rule 23(a)." Now, in light of *Amchem*, we know this conclusion was incorrect: Adequacy is determined as a matter of law.

2.

The *Amchem* Court also emphasized the crucial distinction between the adequacy of the class representatives themselves, on the one hand, and the adequacy of class counsel, on the other hand. Thus, the *Amchem* Court, rather than looking at the plaintiffs' lawyers' competence or ethical conflicts of interest, questioned whether the named plaintiffs shared the same interests as did the class they purported to represent.[19] The

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18 Of course, the underlying circumstances — for example that certain types of claimants are differently situated in the settlement value of their underlying claims — would be a factual matter.

19 Rule 23(a)(4) requires that both the named plaintiffs and the class counsel be adequately representative. The Court made this distinction explicit, noting, "we decline to address the adequacy-of-counsel issues in light of our conclusion that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class." *Amchem*, ___ U.S. at ___ n.20, 117 S.Ct. at 2251 n.20.

Court stated that the rule 23(a)(4) adequacy inquiry requires that "the named parties will fairly and adequately protect the interests of the class." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2250 (emphasis added, internal quotations omitted). Not just the attorneys, but also the named parties must be without conflict with the class they seek to represent. *Id.* This is especially true where, as here, claimants are deprived of the right to opt out. See *Ahearn I*, 90 F.3d at 1009 (Smith, J., dissenting).

3.

Throughout *Amchem*, the Court reminds us that the rule 23 class composition requirements are structural protections: prophylactic rules that must be applied even where a seemingly desirable result has been achieved without their help. Noting Congress's direction that the rules of procedure "shall not abridge any substantive right," 28 U.S.C. § 2072(b), the Court states that rule 23's "dominant concern" is whether "absent class members can fairly be bound by decisions of class representatives." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248. The adequacy inquiry is ultimately designed to protect the members' due process rights, to keep them from being bound in absentia by someone who does not adequately protect their interests. See *id.*; see also *Hansberry* v. *Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). In other words, the class certification inquiry does not examine the merits of the tradeoffs created by a settlement, but examines whether class representatives and class counsel had the authority to trade at all.

Amchem thus specifically rejects any attempt to circumvent the structural safeguards of rule 23(a) by looking only to the substantive fairness of the outcome under rule 23(e).[20] The rules "designed to protect

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20 As one academic noted, "[D]ue process must mean something other than that the result is just, otherwise some lynchings would be consistent with due process." Susan Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1123 (1995).

absentees by blocking unwarranted or overbroad class definitions [ ] demand undiluted, even heightened attention in the settlement context." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2248. Ignoring the class proponents' protestations that the settlement was fair, and that the class members' interest in achieving a fair settlement established a unifying interest among all the members, see *Amchem* Brief for Petitioner at 43-48, 1995 WL 721641, at *43-48, the *Amchem* Court unequivocally reiterated that structure must prevail over content.

It is not enough that a named plaintiff in fact works for the overall good of the class. A representative must "possess the same interest and suffer the same injury as the class members" and must be aligned in interest such that no conflicts exist between the representative and any "discrete subclasses" within the broader class he purports to represent. *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2251. *Amchem* demands a "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.* (emphasis added).

A corollary of rule 23(a)(4)'s mandate of unconflicted representation as a "structural assurance" is that any real conflict, even if minor when compared to interests held in common, will render the representation inadequate. Thus, *Amchem* did not weigh the myriad common interests within that class against the conflicts, in order to decide whether the conflicts were "de minimis" or were somehow overcome by the commonalities.

Rather, the analysis was explicitly focused on the mere existence of some intraclass conflict.[21] Cf. *Amchem*, ___ U.S. at ___-___, 117 S.Ct. at 2250-51. And the Court specifically stated that the class conflicts were

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21 **The only intraclass conflict identified as such by the Court was the conflict between the currently injured and exposure-only plaintiffs. See *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2251. The same conflict, of course, exists here.**

not "made insignificant" by the ample funding provided by the settlement. *Id.* at ___, 117 S.Ct. at 2251. In accordance with *Amchem*, therefore, we should not care — because the Supreme Court did not — whether having maximum dollars in a settlement fund is in everyone's interest, or even whether that unifying interest seems to outweigh the singular and disunifying interests among the various *de facto* subclasses.

Amchem requires that the class representatives possess an identity of interest with the class they represent, and also that "the named plaintiffs operated under a proper understanding of their representational responsibilities." *Id.* Where discrete subclasses exist, each "separate constituency" must be represented as such:

> "The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups."

Amchem, ___ U.S. at ___, 117 S.Ct. at 2251 (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d at 742-43).

Therefore, in order for this class properly to be certified, exposure-only and pre-1959 representatives must have been representing the interests of their own subgroup, not the amorphous interest of the class as a whole. But there was no structural mechanism here to ensure that each discrete interest (such as the exposure-only claimants' interest in a lower damage cap) was given an advocate in the settlement negotiations. Rather, if these discrete interests were voiced at all, it would have been by someone perfectly willing — indeed, obligated by his duty to the class as a whole —

to subordinate that discrete interest to his conception of the broader interests of the class.[22]

B.

Two important conflicts exist between certain class members and their representatives.[23] The same conflict between present and future claimants identified in the *Amchem* class also is present here: "Most saliently, for the currently injured, the critical goal is generous immediate payments. This goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2251. Because of that conflict alone, this cannot go forward as a single class.

Furthermore, this class contains the additional conflict between the pre- and post-1959 claimants. These groups are treated alike under the settlement, even though their claims are worth vastly different amounts in the tort system.[24] These structural conflicts effect-

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22 As discussed below, the terms of the settlement demonstrate why interested and express advocacy was necessary: It appears that the most cohesive and self-identified group — the presently injured — may perhaps unconsciously have advanced its own interests at the expense of the more diffuse and unidentified future claimants.

23 These two structural conflicts are not the only ones, however. For example, the direct claimants — who allegedly suffered injury from direct exposure to asbestos, and would recover under any tort regime — are in opposition to the indirect claimants — who only suffered injuries such as loss of consortium, and whose claims might not be cognizable in some states. See 41 AM.JUR.2D Husband and Wife § 247 (stating that jurisdictions may treat loss of consortium claims as derivative of the underlying personal injury, and thus a judgment in one establishes res judicata as to the other, or they may treat the loss of consortium claim as a distinct action). Obviously, negotiating the settlement's treatment of indirect claimants will pit these two groups against each other.

24. Before the settlement became imminent, the pre-1959 claims settled for an average of $12,000, while the post-1959 settled for only $4,000. Once the asbestos world expected that the settlement

(*concluded on page A-21*)

ively create discrete subgroups within the *Ahearn* class. Even if these conflicts are small in comparison to other arguable common interests, certification of the conflicted class was improper without proper subclassification and representation.[25]

Because the panel majority states that "there was no allocation or difference in the award, according to the nature or severity of injury," one is led to infer that the only interest that was ever in play here was the unitary interest of all the class members in receiving money. That inference is incorrect.

The settlement has two essential parts: a common fund and a mandatory process for distributing that fund. Even if all claimants are treated alike under the settlement — without regard to their status — this still

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(*continued from page A-20*)

would go through, the pre-1959 claims settled for only $8,000, while the value of the post-1959 claims had risen to $7,000. MEALEY'S LITIG. REP. June 2, 1995, at 20.

25 I note, however, that the putative class's common interests are not overwhelming. The panel majority describes those interests as "suffering harm from asbestos exposure and seeking equitable distribution of compensation from limited funds." This is in accord with the original majority opinion, which essentially found the common interest to be maximizing and efficiently distributing the settlement. *Ahearn I*, 90 F.3d at 981.

Amchem refutes the proposition that the class members' common interest in achieving or maximizing a settlement could align their interests sufficiently enough to satisfy rule 23(a)(4). The district court that originally certified the *Amchem* class relied on this rationale: "So long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." *Georgine* v. *Amchem Prods.* , 157 F.R.D. 246, 317 (E.D.Pa. 1994). But the Supreme Court squarely rejected this rationale. The fact that everyone had an interest in receiving money does not suffice to ensure that the named parties would "fairly and adequately protect the interests of the class." See *Amchem*, ___ U.S. at ___-___, 117 S.Ct. at 2250-51. The putative class members' lack of common interests is dealt with at length in Part V, below.

reflects an allocation decision, with the various groups pitted against each other to receive parts of the fund.

In order to negotiate the settlement fund and establish the distribution process, the parties engaged in a series of compromises, attempting to balance the interests of the various subgroups in order to arrive at a settlement to the benefit of all. Thus, individual claims are capped at $500,000, regardless of the nature of the claim or when it manifests itself.[26] There is an outright ban on punitive damages. Pre- and post-judgment interest is eliminated, despite its availability in many jurisdictions and its obviously disproportionate impact on latent claimants. Claims arising under highly different legal systems — such as maritime versus non-maritime law, and common law versus civil code — are treated identically.

But perhaps the most salient allocation was the decision to treat the pre- and post-1959 claimants alike. It is true that the class as a whole benefited from this, and perhaps from each of the other compromises.[27] It is also true that the settlement treats everyone the same. But in so doing, it ignores the pre-settlement status — and rights — of the widely disparate groups of claimants.[28]

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26 By contrast, mesothelioma claims had averaged tort recoveries in the millions. Also, consider how this cap reflects an allocation between latent claimants — who desire a low cap, in order to preserve the fund for when their injuries become manifest — and patent claimants — who would prefer high present damages.

27 It is axiomatic that the class as a whole was giving something up in return for the guaranteed settlement. Fibreboard and its insurers must have thought they were getting a good deal — that the settlement cost was less than their actual liability — or they would not have entered into the agreement. The question, though, is whether some claimants' rights were traded away, and whether those claimants were adequately represented.

28 This might be likened to an airline that eliminates both coach and first class seating, creating a new "business class" for

(*concluded on page A-23*)

The settlement forced the pre-1959 claimants to give up something of value that is legally their due — their cause of action against an insured Fibreboard — in order to benefit a group of claimants to whom they owe nothing. To deprive them of that right requires that the absent class members have been protected by rule 23(a)(4)'s structural safeguard of due process through representation.

It is immaterial that, arguably, the settlement might not have been different had it been negotiated with representatives of the subclasses. Likewise irrelevant is whether the settlement was fair and in everyone's best interest. The gravamen of prophylactic rules is that they must be followed even where they seem burdensome and inconsequential.

C.

The panel majority apparently believes the adequacy inquiry in this case to be distinguishable from that in *Amchem*, for this is a rule 23(b)(1)(B) action, while *Amchem* was not. That distinction is relevant, but it cuts against certification. Here, in a limited fund action, it is even more true that the class members were pitted against one another, and that their interests needed to be aligned with those of their loyal representatives.

In *Amchem*, the Court stated that "[a]lthough this is not a 'limited fund' case certified under Rule 23(b)

(*continued from page A-22*)

everyone, and then applies this new arrangement to a flight on which many of the seats have been sold. Those who bought a coach ticket are thrilled to receive a better level of service, but those who paid for first class have been deprived of their due. Even if the group as a whole is better off — for the many coach passengers' happiness outweighs the few first class passengers' disappointment — this would be unacceptable.

In economic terms, this result would be *Kaldor-Hicks* optimal. But here, in order not to divest vested rights, any acceptable result must come closer to *Pareto* optimality.

(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability." ___ U.S. at ___, 117 S.Ct. at 2251. Thus, even though the *Amchem* defendants had a theoretically unlimited supply of dollars with which to pay future claimants — so that the allocation of dollars was not a zero-sum game, and class members' potentially conflicting interests were thus arguably not pitted against one another — still, that settlement made "essential allocation decisions" by which some class members won and some lost. Thus, the Court worried that the settlement had chosen winners and losers "with no structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.*

Here, there is no question that the settlement makes "essential allocation decisions." This is, after all, a "limited fund" class, in the view of the panel majority. If that is so, there is only one apple, and anyone who might ever assert a claim against the defendants is fighting for a bite of it. The need for adequate representation is even more important where, as here, one person or group loses for every time another person or group wins.

The settlement's terms reveal its inter-group allocative effect. The high cap on damages hurts latent claimants (who would prefer a lower cap to ensure that there is some money left when their injuries finally become manifest), while patent claimants benefit. The ban on punitive damages hurts claimants from jurisdictions where such awards are generally available, saving a larger slice of the apple for those for whom punitives would not be available. Perhaps most egregiously, the settlement eliminates the privileged status of the pre-1959 claimants (who were covered by Fibreboard's insurance policy) and places them on equal footing with the post-1959 claimants (whose claims were largely uninsured). This settlement undeniably picks winners and losers.

A limited fund only increases the potential of intra-class conflicts. If the settlement in *Amchem* was legally flawed, this one is even more so. Where, as here, there are significant and potentially adverse subgroups within a class, their interests must be protected by representation as such.

Although recognizing that the class representatives might have thought the settlement in the best interests of the class as a whole, the Court in *Amchem* demanded a "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.* at ___, 117 S.Ct. at 2251. This case demands no less.

VI.

The *Amchem* class was rejected also, in part, because common questions of law or fact did not predominate over questions affecting only individual class members. See *id.* at ___, 117 S.Ct. at 2249 (citing rule 23(b)(3)). That analysis does not directly control the instant supposed "limited fund" class, for rule 23(b)(1)(B) imposes no such predominance requirement, but calls only for rule 23(a)(2) commonality. And, noting that for rule 23(b)(3) classes the test of commonality is subsumed under or superseded by the more stringent predominance inquiry, the Court declined to address commonality as such. *Id.* at ___, 117 S.Ct. at 2243.

Here, where common issues need only exist, not predominate, *Amchem*'s ultimate conclusion has no bearing on the type and relative significance of the issues necessary to pass muster under rule 23(a)(2). The *Amchem* analysis is still pertinent, however, for *Amchem* speaks directly to the relevance of the settlement to either inquiry. *Amchem* tells us what sort of common issues may be considered: whether they must preexist the settlement, or whether an interest in the settlement itself may provide the common issues in satisfaction of rule 23(a)(2) or rule 23(b)(3).

Amchem tells us that, although a settlement is "a factor in the calculus," ___ U.S. at ___, 117 S.Ct. at 2249,[29] the parties' interest in the settlement will not suffice to establish a "common interest" among the class members. "The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme . . . is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Id.* (emphasis added). "If a common interest in a fair compromise could satisfy the predominance requirement . . . , that vital prescription would be stripped of any meaning in the settlement context." *Id.* at ___-___, 117 S.Ct. at 2249-50.

The class proponents would object that by its terms, this rule speaks only of "predominance," not "commonality." Here, though, that is a distinction without a difference. That the predominance inquiry imposes a higher standard — by requiring not only that the common issues exist but that they outweigh the uncommon issues — is irrelevant, for the Court made explicit that the issues themselves — whether they must be "predominant" or simply "common" — must arise from interests that preexist the settlement.

That there is a settlement, or that it is fair, does not eliminate or modify the other requirements of rule 23. *Id.* at ___, 117 S.Ct. at 2248. The plain text of rule 23 requires the putative class to meet its requirements by

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29 The Court found the fact of and terms of a settlement relevant in only three contexts: (1) The terms of the settlement may indicate whether the absentees' interests are adequately represented. ___ U.S. at ___-___, 117 S.Ct. at 2248. (2) The fact of a settlement also eliminates the need for a rule 23(b)(3)(D) manageability inquiry. *Id.* And (3) when a class is a settlement-only class, it requires that heightened attention be given to the class definition, as there will be no way to refine and adjust the class as litigation unfolds. *Id.*

reference to the intrinsic features of the class members' claims, not to the settlement. *Amchem* reminds us that courts "lack authority to substitute for rule 23's certification criteria a standard never adopted — that if a settlement is 'fair,' then certification is proper." *Id.* at ___, 117 S.Ct. at 2249. A court must apply the "criteria the rulemakers set." *Id.*

A settlement cannot itself be used to establish commonality, because to do so would cripple the settlement process from its inception; a putative class unable to meet the requirement of rule 23(a)(2) without the "commonality" established by a settlement could never be certified for litigation. And if settlement were allowed despite the impossibility of litigation, class counsel "could not use the threat of litigation to press for a better offer," and the resulting settlement would be a one-sided deal that sells out the plaintiff class for a pittance and works only in the true interest of the defendant and its insurers and the attorneys for both sides. See *id.* at ___-___, 117 S.Ct. at 2248-49. For policy reasons as well as adherence to the text of the rule, then, *Amchem* mandates that every class meet the rule 23 certification requirements independently of any common interest they might share in obtaining or maximizing the proposed settlement.

In its original opinion, the panel majority relied exclusively on the common interest of the class members in the settlement, citing *Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 211 (5th Cir. 1981),[30] for the proposition

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30 I reiterate that *Corrugated Container*'s reliance on the fairness of, and interest in, the settlement is invalidated by *Amchem*. Also in doubt is the viability of *Meat Price Investigators Ass'n v. Iowa Beef Processors (In re Beef Indus. Antitrust Litig.)*, 607 F.2d 167 (5th Cir. 1979), in which this court stated: "[A]s the law now stands, tentative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge." *Id.* at 174.

that "the terms of the settlement were vitally important to the determination that certification was appropriate." *Ahearn I*, 90 F.3d at 975. The majority went on to cite other authority for the proposition that "in the settlement class context, common issues arise from the settlement itself," *id.*, and then applied its view of the law to the putative *Ahearn* class:

> The district court, in its findings of fact, found that the entire Global Health Claimant Class had the following issues in common:
>
> (i) avoiding the potentially disastrous results of a loss by Fibreboard in the Coverage Case appeal;
>
> (ii) maximizing the total settlement contribution from Fibreboard and the Insurers;
>
> (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transactions costs and delays in compensation;
>
> (iv) minimizing the percentage of their compensation diverted from them to pay attorneys' fees; and
>
> (v) adopting procedures that provide for payments to claimants in an equitable manner.
>
> The intervenors do not disagree that the settlement class holds these issues in common. Instead, they argue that these issues do not support a finding of commonality because they are derived from the settlement rather than from the *Ahearn* complaint. As we noted above, this argument has no merit and is foreclosed by our holding in *Container I*. Because the evidence is overwhelming that the class holds the above issues in common under the settlement (even the intervenors concede this point), we agree with the district court that the *Ahearn* action

> and the Global Settlement Agreement presented it with questions of law and fact common to the entire Global Health Claimant Class.

Id. at 975-76. This passage makes apparent that the panel majority based its finding of commonality solely on the now-discredited theory that the class members' interest in the settlement itself is sufficient to fulfill rule 23' s commonality requirement.[31]

In its latest opinion, the majority addresses this point in one sentence: "All members of the class, and all class representatives, share the common interests: suffering from asbestos exposure and seeking equitable distribution of compensation from limited funds." As I have said, the latter "interest" in the settlement fund, because it does not preexist the settlement, cannot establish commonality. And the putative interest in "suffering from asbestos exposure" is simply inadequate.

To begin with, it is factually incorrect to say that all the class members have "suffered from asbestos exposure."[32] The futures claimants, of course, have, by definition, "suffered" nothing, although presumably they have been exposed. Likewise, the future children and future

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31 The common issues described by the district court and the first panel opinion are remarkably similar to one of the common issues relied on by the *Amchem* district court and squarely rejected by the Supreme Court: "their common 'interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system.'" *Amchem*, ___ U.S. at ___, 117 S.Ct. at 2249 (quoting *Georgine* v. *Amchem Prods., Inc.* , 157 F.R.D. at 316). This benefit, the Court held, "is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry." *Id.* (emphasis added).

32 This "interest" is like the "interest" the majority identified in its prior opinion: that, in addition to the now discredited "interest in the settlement" theory, commonality exists because "Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos." See *Ahearn I*, 90 F.3d at 975-76.

spouses of persons exposed to asbestos have suffered nothing and have been exposed to nothing.

Presumably the majority means that by the time their claims ripen and become justiciable, every class member will have a common interest in that he will deserve some compensation from Fibreboard that in some way stems from Fibreboard's manufacture of asbestos. At such an extreme level of generality, the members of this class conceivably could possess some level of commonality. But this is not a justiciable common interest sufficient to maintain the class.

Consider a commercial airline that suffers several disasters: one in Oregon, one in Louisiana, and one off the coast of Brazil. The owners of property that is damaged when the plane crashed into it, the bystanders injured by flying debris, and the deceased passengers' and crewmembers' next of kin all have "suffered from" the crashes.[33] But no federal court would allow these disparate groups, under dissimilar legal systems, asserting divergent legal claims, all to join together under the aegis of their common "suffering from the airplane crashes."

In such a case, then, the superficial commonality of having suffered some injury will not suffice. Instead, the common issue must be necessary to the theory of recovery: "[T]he individual's claim and the class claims [must] share common questions of law or fact." *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 157, 102 S.Ct. 2364, 2370, 72 L.Ed.2d 740 (1982) (emphasis added). And it must be significant:

> The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guide-

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33 **The reader may add facts as needed to sustain the analogy. For example, the claims against the airline add up to a lot of money, so by the panel majority's reasoning, one might consider the airline and its insurers a "limited fund."**

> posts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

Id. at 158 n.13, 102 S.Ct. at 2371 n.13. It is not enough for some general sort of commonality to exist. The commonality must be justiciable: It must derive from a substantial legal or factual question that is necessary to the class members' theories of recovery.

It might be that the members of the putative *Ahearn* class do have issues in common, issues preexisting and apart from the settlement. It might also be that these issues would suffice to establish rule 23(a) commonality. The district court and the panel majority did not cite any such common issues, however.

In fact, the gist of this class is that the driving commonality was the class members' interest in the settlement itself: that in order to keep the defendants from going bankrupt and to forestall a possibly disadvantageous result in the insurance litigation, the plaintiff class members found it in their common interest to settle. *Amchem* tells us this is not enough.

VII.

In sum, this class cannot go forward. It cannot be certified as a "limited fund" class under rule 23(b)(1)(B), because it does not concern such a "limited fund," but rather is an aggregation of claims against a solvent, ongoing concern and its insurers.

But even if this class did involve a "limited fund" under rule 23(b)(1)(B), *Amchem* makes plain that it must still fail the requirements of rule 23(a). The pre- and post-1959 claimants and the patent and latent claimants are discrete and often adversarial subgroups. That the class structure fails to recognize these groups

as such and to afford them proper representation causes the class to fail the adequacy requirement of rule 23(a). Further, because *Amchem* will not allow commonality to stem from a putative interest in the settlement itself, this class must also fail for want of common issues.

The panel majority embraces a settlement that it considers a triumph of practicality. In doing so, it casually dismisses the teaching of *Amchem* and blesses a class that falls far short of legal and constitutional requirements. I do not believe the Supreme Court spoke cryptically in vacating our earlier opinion while articulating, in *Amchem*, the specific standards for us to apply on remand. Because the majority adheres to an opinion that is foreclosed by the Court's reasoning, I respectfully dissent.

TRANSCRIPT OF ORAL ARGUMENTS

(United States Court of Appeals — Fifth Circuit)

(Proceedings of November 12, 1997)

(JAMES FLANAGAN, ET AL., APPELLANTS, –VERSUS– GERALD AHEARN, ET AL., APPELLEES — NO. 95-40635)

Oral Arguments taken in the above-entitled cause before Brenda H. Andrus, Certified Court Reporter, taken at the United States Court of Appeals for the Fifth Circuit, West Courtroom, 600 Camp Street, New Orleans, Louisiana 70130, on the 12th day of November, 1997.

APPEARANCES:

PANEL: Judge W. Eugene Davis;
Judge Jerry E. Smith

FOR THE APPELLANTS: Steve Baughman, Esq.;
Mike J. Connor, Esq.

FOR THE APPELLEES: Elihu Inselbuch, Esq.;
Herbert M. Wachtell, Esq.

* * *

JUDGE DAVIS: We're here to hear the argument of *Flanagan* v. *Ahearn* primarily on the question of the effect of the impetus of the decision on our case. Judge Reavley was unable to be with us today, but we'll provide him with a tape. First we'll hear from Mr. Baughman.

MR. BAUGHMAN: May it please the Court, Steve Baughman on behalf of the Ortiz appellants. The district court's class certification order is utterly and irreconcilably incompatible with the Supreme Court's decision in *Amchem Products* v. *Windsor*. *Amchem*'s overall theme, its holdings, the language, and the reasoning underlying its holdings and its *dicta* all mandate that this court reverse and remand to the district court with direction to decertify the class.

There are five separate legal issues in this case, all of which *Amchem* has a dispositive impact upon. First, the commonality and typicality requirements of the Federal Rules of Civil Procedure 23(a) are not satisfied here because there is not sufficient unity or cohesion among these class members with respect to the individual personal injury claims for damages.

JUDGE DAVIS: The *Amchem* really didn't talk about commonality, did it, because it wasn't relevant to that case?

MR. BAUGHMAN: Well, Your Honor, *Amchem* talked about predominance in the context of the Rule 23(b)(3) class action, and that is whether or not common issues of law or fact predominate over any individual issues in the case. Of course, that is related to the commonality requirement. It's just a more stringent requirement than the commonality requirement of Rule 23(a).

But in this case, well, No. 1, the language in the reasoning of the Supreme Court in the *Amchem* decision with respect to predominance applies equally to the Rule 23(a) requirements as far as the impact of settlement on the analysis. And, secondly, the settling parties apart from the allegations with respect to commonality as to the loss of insurance coverage risk have identified no common questions of law or fact and those no common questions of law or fact with respect to the individual personal injury damages claims.

JUDGE DAVIS: I thought the opinion just rolled past commonality where it says even if Rule 23(a) commonality requirements may be satisfied, a shared experience of exposure to asbestos products and the predominance criteria is far more demanding.

MR. BAUGHMAN: I think that that's right, Your Honor. In the context of a (b)(3) class, it's easy and appropriate for the Court to blow by the commonality requirement because the predominance requirement is more stringent. And I don't deny that, Your Honor. But the Court cannot blow by the commonality requirement —

JUDGE DAVIS: How does *Amchem* affect our earlier decision or what impact or effect does it have on our earlier decision?

MR. BAUGHMAN: It has this impact and effect, Your Honor. It does set out what role a settlement does and does not play with respect to the propriety of class certification. And it says that a settlement is relevant to class certification but in two very limited ways.

First of all, if it's a (b)(3) class, which this one of course is not, then the manageability criterion of Rule 23(b)(3)(D) is satisfied if the case is settled because you don't have to look to see what would happen at a trial.

And, secondly, with respect to the adequacy of representation, the Court said that it is very important to look at the terms of the settlement to see if there are any problems with the way that the class was represented that would not be apparent or were not apparent by looking at the face of the complaint.

But the Court said with respect to all the other requirements of Rule 23, including commonality and including typicality, that all requirements that are designed to ensure that there is not an overbroad class definition, that the class is sufficiently cohesive to justify representative action in the first place, all of those requirements of Rule 23 not only must receive equal attention in the context of settlement, but perhaps even heightened attention.

And that is directly superseding what this court said in its prior opinion which was that commonality can emerge from the settlement itself. And the *Amchem* court rejected that, not only with respect to commonality, but also with respect to typicality, which I think this court can treat as a pair with respect to this case.

JUDGE SMITH: So you're saying that those elements are things that the Supreme Court described in its questions that it's preexisting any settlement?

MR. BAUGHMAN: Yes, Your Honor. Not only do they have to preexist any settlement, they have to be set

from the claims that are pled in the complaint and certified for class treatment. In this case the claims that have been pled in the complaint and certified for class-wide treatment by the district court are individual personal injury damages claims. They are not claims with respect to securing insurance coverage on behalf of Fibreboard Corporation.

Mr. Ahearn may well have been able to file some sort of an intervention action in the California state court proceeding that was ongoing with respect to Fibreboard's insurance coverage, but that was not what this case was about.

This case was about substituting for the lawsuits that individual members of this class could file for damages against Fibreboard now or in the future, substituting for their substantive rights under state laws, an equitable claims distribution process and administrative claims procedure, just as the *Amchem* settlement did with respect to the class members in that case.

Secondly, *Amchem* established that the conflict among certain groups of class members in this case preclude any finding of adequacy of representation. The conflict between currently injured members of this class and members who have not yet suffered any injury is the same or virtually identical in this case as it was in *Amchem*, and the Court's holding with respect to adequacy in that case precludes adequacy in this one.

JUDGE SMITH: Does that also apply to pre- and post-1959 conflict in this case? I realize that was not present in *Amchem*.

MR. BAUGHMAN: That's correct, Your Honor. I believe that the *Amchem* holding on adequacy is also applicable with respect to the conflict in this class of pre- and post-'59 class members. Obviously, you have to actually apply the law to the facts for that analysis as opposed to the conflict being nearly identical with respect to the exposure only versus the currently injured.

And, third, the *Amchem* Court repeatedly emphasized that courts must interpret and apply Rule 23 so that its

application will not violate the Rules Enabling Act by bridging, enlarging, and modifying substantive right.

Now, after *Amchem*, this court can no longer ignore the fact that the very purpose of the mandatory certification in this class was to just bridge, enlarge, and modify substantive rights of class members vis-à-vis one another.

The purpose of the certification here was to impose limitations on the rights of currently injured class members in order to preserve assets for class members that get sick later on. That is a substantive adjustment of rights and it is not permissible under the Rules Enabling Act.

Fourth, the Court in *Amchem* voiced very grave concern as to whether notice in the cases involving future claims for latent toxic injuries could ever satisfy Rule 23 or due process. And, in fact, the Court in discussing that issue, although it did not reach the merits or decide the issue, it did approve cite judgments in this case.

JUDGE DAVIS: It said it may be a problem on the effect of the decision.

MR. BAUGHMAN: That's correct, Your Honor, but the language is there for a reason. And the reason, I believe, is to give guidance to the lower federal courts as to whether or not that notice is proper or not. And at the very least, the Court expressed what it called very serious grave concerns about whether or not that could ever be possible.

JUDGE SMITH: I think both sides agree in the substantive briefs that that's *dicta*.

MR. BAUGHMAN: It is *dicta*, Your Honor, but *dicta* is meaningful. *Dicta* from the Supreme Court is particularly meaningful. It is law. It has less effect, obviously, than if it were a holding, but the language has to be in there for some purpose.

And, fifth, the Supreme Court said that if it had upheld the class certification in *Amchem* or its holding with respect to class certification had required a

remand to the district court for further findings, then the subject matter jurisdiction issues in the case would have loomed much larger.

Now, again, the Court did not address the merits of the issues, but again the language is there for a reason and a purpose. And the purpose has got to be to give guidance to the lower federal courts about the seriousness of the subject matter jurisdiction allegations in that case which are again virtually identical to the arguments with respect to the absence of subject matter jurisdiction in *Ahearn*.

Now, turning back again to the commonality and typicality requirements of Rule 23(a), by its terms, Rule 23 requires that there be a common question of law and fact with respect to the claims alleged and the claims certified and the claims released by the settlement and that the claims of the named class representatives must be typical of the absent class members.

You may recall from the first argument in this case that Mr. Wachtell on behalf of the settling parties conceded that absent a settlement, this case could not go forward as a class action.

JUDGE DAVIS: Well, the Supreme Court said it is a fact to be considered. Why is that inconsistent?

MR. BAUGHMAN: It's inconsistent, Your Honor, because the Supreme Court was very careful in discussing and limiting how the settlement is a factor. And a settlement clearly under the Supreme Court's language is not a factor for purposes of specifications of the Rule that are designed to protect absentees by blocking unwarranted or overbroad class definitions.

Now, clearly, the Rule 23(a) requirements of commonality and typicality are specifications of the Rule designed to protect absentees by blocking unwarranted overbroad class definitions. The only way that a settlement is relevant, according to the Supreme Court, to class certification is with respect to the manageability inquiry that's not present in this case, No. 1; and, No. 2, with respect to trying to investigate to see if there are

additional adequacy of representation problems raised by the settlement that would not have been apparent merely by looking at the face of the complaint.

So Mr. Wachtell was not saying that the settlement here obviously created any adequacy problems. Nor was he saying that the manageability inquiry applied. What he was saying is that the settlement created common and typical issues itself that were not present without the settlement. That is exactly what the Supreme Court rejected in *Amchem*.

Moreover, there are exposure to product cases. Judge Davis, you suggested from some language in Justice Ginsburg's opinion that perhaps exposure to the asbestos-containing products themselves is a common issue of law or fact. But, actually, it's just the opposite. It's a definition. It defines class membership, but it's an individual issue of fact.

Each and every member of this class, in order to establish class membership and in order to establish a right to obtain damages against Fibreboard, would have to show the separate and individual and unique circumstances of their own exposures which, of course, differs from class member to class member.

With respect to adequacy of representation, there are, as Judge Smith and I discussed just a moment ago, two separate interclass conflicts in this case, both of which preclude a finding of adequacy of representation as interpreted by the Supreme Court in the *Amchem* decision.

The first of those is almost an identical conflict as what was present in the *Amchem* case, and that is that there are members of this class such as Esteban Ortiz, the objector and appellant here, that already have an asbestos-related injury and could, absent the injunction that was entered by the district court four years ago, have sued Fibreboard, gotten a trial, obtained a judgment, and enforced that judgment in full against Fibreboard. But the injunction prohibited him from doing that, and the class certification in this case prohibited him from doing that.

JUDGE DAVIS: That *Findley* case from the Second Circuit that the Supreme Court approved, that's a (b)(1)(B) class?

MR. BAUGHMAN: That's correct, Your Honor. That was a (b)(1)(B) class arising out of the restructuring of the Johns-Manville Bankruptcy Trust. The Manville Bankruptcy Trust as originally structured was running out of money, and Judge Weinstein decided that the lawyers ought to try and restructure it.

And they did that and they did it through the vehicle of a Rule 23(b)(1)(B) limited funds class action using the trust itself as a res, r-e-s, that was being restructured.

JUDGE DAVIS: Didn't they have presently injured and futures in that class, too —

MR. BAUGHMAN: That is correct, Your Honor.

JUDGE DAVIS: — that the Court required subclasses?

MR. BAUGHMAN: In the original opinion of the Second Circuit, Your Honor, the Court determined that subclasses were necessary with respect to those groups. And the *Amchem* decision quotes extensively from that decision, the first decision of the Second Circuit.

JUDGE DAVIS: But it doesn't disapprove the modification either, does it?

MR. BAUGHMAN: No. The *Amchem* decision doesn't speak one way or the other to the modification, but it does certainly approvingly cite the language from the first opinion that required subclassing in this context, which implicitly rejects all of the settling parties alleging as to why 23(b)(1)(B) cases can't ever require subclasses because there's a need for a unitary resolution and how the case is distinguishable because supposedly people like Mr. Ortiz who are already currently injured have no substantive right to go out and get relief against Fibreboard.

I can't make any sense of that, Your Honor. They do have that right absent this case. They do have the right to sue, pursue, and enforce a judgment against Fibreboard.

JUDGE DAVIS: But in *Findley*, as I read the final decision, they said that subclasses were not necessary except in the instance where they had a different compensation scheme for the severely injured and the non-severely injured. And because of the different compensation scheme, subclasses were necessary. Isn't that essentially what they said?

MR. BAUGHMAN: I don't think so, Your Honor. I believe that the Second Circuit's opinion on rehearing establishes that the reason why its first opinion was being modified was that they had determined that they were mistaken about whether or not the timing element of how currently injured people were treated differently, the first-in-first-out sort of ordering mechanism that was established initially under the trust, was not substantive.

It wasn't part of the original substantive rights that were established by the trust mechanism. That's quite different from the substantive right of somebody who is already injured to pursue a claim against Fibreboard in the tort system in state or federal courts in this country.

Those substantive rights are very well established by the common law, and it's not subject to whatever the particularity of the particular specific trust mechanism that was at issue in the *Manville* case.

JUDGE DAVIS: The Supreme Court in *Amchem* paid a lot of attention to the details of the settlement in the *Amchem* settlement. And they are strikingly different from the one in our case, are they not?

MR. BAUGHMAN: There were different provisions, different limitations put for purposes of class certification, Your Honor. The important thing to realize is what this court must address is whether or not there is sufficient cohesion to justify representative action in the first place. In other words, the issue is not what limitations were imposed in *Amchem* as versus what limitations were imposed in *Ahearn*.

JUDGE DAVIS: Well, the whole point of the *Amchem* decision and class certification, and the Court obviously

thought it was as evidenced by the long discussions about it.

MR. BAUGHMAN: And I submit, Your Honor, that if this case is presented to the Supreme Court, the Supreme Court will extensively discuss the limitations that are imposed on class members' claims by the Ahearn Trust.

The point is that limitations were imposed at all because without the class certification with respect to the individual damages claims, there would not have been any authority in either *Amchem* or *Ahearn* to trade off or impose limitations on those class members' claims at all. The class certification —

JUDGE DAVIS: We'll move on to rebuttal now.

MR. BAUGHMAN: Yes, Your Honor, just to answer this question. The class certification order in both cases authorized the class representatives to release, limit, give up claims of all class members with respect to individual damages. Now, there are different limitations. The trade-offs were different in the two cases.

That's only relevant under Rule 23(e) to determine which settlement was more fair than the other. But as to whether or not that authority should have been given at all, that's an issue that is relevant to class certification and which is not met either in *Amchem* or in this case.

JUDGE DAVIS: Mr. Connor.

MR. CONNOR: Good afternoon. I'm Michael Connor on behalf of the Middleton Flanagan intervenors below the appellants. I do have five minutes, and your very efficient clerk asked me if I wanted to divide that. I will take all of my time at this time.

I wanted to address again the adequacy of the representation. I think that there are three very serious conflicts that in this instance would preclude the certification. Two of those are addressed at least in part, one of those being the present, or extant, injuries versus the latent injuries.

And it seems to me that it's very, very clear from *Amchem* that there is going to be a necessity for indi-

vidual representation, individual counsel when that kind of conflict exists. It existed in *Georgine*. It exists in *Ahearn*.

There's also the pre-1959. And just so the record reflects it briefly, in the case of the pre-1959, of course, that triggered the insurance that Fibreboard had. The post-1959, they would have to go to the very limited Fibreboard's assets themselves.

In the case of the 25,000 Merchant Mariners that were negotiating with Fibreboard at the time the settlement came down, it deprived them effectively of their right to trial, at least an unlimited trial, by placing significant hurdles in their way and giving an opt out that limited them to $500,000 damages. Of that number of 25,000, something in the area of 70 percent had pre-1959 exposure on board the vessels with Fibreboard asbestos products.

What that means is that clear preference of the pre-1959, a preference that was reflected in the average settlement in 1993 of $12,000 per pre-1959, and $4,000 for the post-1959, ended up after the settlement in leavening that off in 1994, to the pre-1959 having an average settlement of $8,000 and the post-1959 having an average settlement of $7,000. I would presume if we ran the same statistical test today, we'd find essentially the same.

In other words, what happened, and the Court addressed it very briefly, is that the pre-1959, having no representation whatsoever — and as the Court pointed out, in fact, using it as an explanation stated that Fibreboard would not negotiate those separately — had to give up their rights without representation either by a subclass or by counsel in order that they could secure a settlement for the entire group.

JUDGE DAVIS: My recollection of the record is that a settlement was agreed to between the presently injured which I assume to include all of the pre-'59. That was a done deal before the futures settlement ever came under consideration. That figure never changed. So if

they negotiated that settlement over arms-length, what do they have to complain about?

MR. CONNOR: That isn't really what I'm referring to. This is another conflict, I believe.

JUDGE DAVIS: All the present claimants, wouldn't all the pre-'59 people fall into the present claims?

MR. CONNOR: No, certainly not. Of the 25,000 mariners, for instance, none of those were filed. We filed 9,000 cases two days after the cutoff when we found out that they were going to have a cutoff, and we couldn't quite make it in time. That was an artificial date. But of those 25,000, approximately 17,000 have pre-1959 exposure and none of those are in the individual case file.

But that is the third conflict, and I believe that that is an extremely important conflict. That is a conflict of nez motley [*sic*]. That's a conflict of nez settling [*sic*]. At the same time they have negotiations going on for the global settlement, they are settling their individual cases.

And the individual cases were settled in a manner which they got 50 percent in front at the time, but the remaining 50 percent would not be paid until such time as there was either a global settlement of the futures or a favorable result in the coverage case.

The only way they could ensure that they would get that additional 50 percent — which after all, they were going to be recompensed on a contingency basis — the only way they could ensure that was to have a global settlement, nō opt out, futures only. And it seems to me that, as was suggested in the sentence below, that there is a possibility for exclusion. It's a tremendous temptation.

And in this case, indeed we do know that the individually filed cases were settled at a tremendously inflated rate. I know there's reasons given for that. The reasons were that they wanted to get the coverage people to the table. But, indeed, what it amounted to is once that deal was made, the only way they could get the additional 50,000 was either favorable result in that coverage case or they had to have a settlement of the futures.

And that is a tremendous temptation to sell off the futures, at the very least those 17,000. Those 25,000 mariners who lost their right to trial unless they exposed their case, went to settlement, had mediation, had arbitration, had a second settlement, and then went through the back door with their damages limited to $500,000, they would not have given up that right.

JUDGE DAVIS: Thank you. Mr. Inselbuch.

MR. INSELBUCH: May it please the Court, I'm Elihu Inselbuch. I was of counsel to the plaintiffs' class. I have our time, plus I've conceded Fibreboard's counsel ten minutes, Fibreboard's counsel Mr. Wachtell who will take the remaining ten minutes of our time. I will address the same issues as Mr. Baughman and Judge Connor did in perhaps a different order.

I would submit that the *Amchem* case and this case are entirely different in fact patterns. And although they may have some issues in common and while there is teaching from the Supreme Court that affects some of the issues in this case, it is a mistake and one must blink reality to pretend that the two cases are on all fours. I heard nothing from Mr. Baughman about what the district court and this court found to be the common issues.

And I think the best place to look for that is perhaps in the memorandum that the district court entered which is found at Ortiz appellant's record excerpts Volume 2, Tab 8, where the Court said at page 45, "All Class (b) members here have an overriding common interest in the limitations of risk posed by the coverage litigation and create a substantial fund and insurance proceeds to provide compensation for class members.

Consequently, many major issues presented by the class are common to all of its (b) members, including whether claimants against Fibreboard have a right to substantial insurance proceeds, notwithstanding the existence of a coverage dispute and whether some curtailment of the class' rights in the tort system is appropriate

in order to enable a resolution of the coverage dispute that equitably distributes the insurance proceeds.

That was what this case was about. That's all the litigation was about below. That's what the litigation between Fibreboard and its insurers was about. That's what the litigation between plaintiffs and Fibreboard and its insurers was about in California where they were testing whether or not Fibreboard could cut off CNA's rights in litigation that was based upon settlements entered into between the plaintiffs and Fibreboard.

That's what the litigation was about between Fibreboard and its two insurers in the district court below where they were arguing about whether or not a settlement with one insurer could cut off the rights of other insurers. The focus of this dispute was whether or not there would be a fund zero dollars or lots of dollars in order to pay the claims of the asbestos victims whose claims would mature in the future.

And it blinks reality to suggest that what the district court was certifying was a garden variety tort case. That's what *Amchem* was and that's what this was not. But, yes, we still learn from *Amchem* that we must look beyond the settlement to evaluate whether or not Rule 23(a)(2) rather than Rule 23(a)(3) and Rule 23(a)(4) have been satisfied.

And I submit to you that this district court and the panel below the last time around clearly found that the common issues existed. This court at 90 Fed 3d 976 held the named plaintiffs settled *Ahearn* because of their desire to avoid the risks of insurance coverage litigation and to ensure that money remains available to pay their claims when they make it through the settlement and/or trial process to final judgment.

That's what this was about. That's what the district court said this was about. And the claims of the class representatives were typical of all Class (b) members in that report. And there is nothing, nothing in the Supreme Court's opinion that changes those facts or those issues.

Now, to turn to (a)(4), adequacy of representation, if this court were to adopt Mr. Baughman's analysis of when a conflict exits, it would in effect repeal Rule 23(b)(1) and (b)(2) because what the *Manville* Second Circuit Court teaches us is, yes, where there is a right, an enforceable right to a preference that some members of the class have over other members of the class — and in *Manville* I argued both arguments.

In *Manville* what you had was a FIFO queue for processing of claims, and the Second Circuit decided the first time around that if you were early enough in the FIFO queue, that gave you a substantive right, a legally enforceable right, to be paid 100 cents on the dollar before people further down the line got anything and, in fact, to the detriment of other people down the line who would get nothing.

That's the race to the courthouse that 23(b)(1)(B) is all about. It's to prevent that race. It's to prevent some members of the class for one reason or another in the tort system who get to the pot first from collecting money to the detriment of people with equal rights to that grease.

JUDGE SMITH: That doesn't answer the question, though, as to whether once they get to the courthouse, they shouldn't have class representatives and class counsel to represent the various disparate interests that the Supreme Court spoke to in *Amchem*.

MR. INSELBUCH: With all due respect, Your Honor, as the Second Circuit said in its rehearing opinion and as it held and as the Supreme Court cited with the approval, there is no disparate interest that's enforceable. There is no interest that anyone has to take more. That doesn't mean that every member of the class wouldn't want to take more.

JUDGE SMITH: Well, the Supreme Court spoke, as you know, very forcefully in *Amchem* to the different interests between the exposure only plaintiffs and the currently injured.

MR. INSELBUCH: Yes, Your Honor, in the context of no defendant urging there was a limited fund. There were unlimited assets for all of these people to recover. And the differences were created by the settlement.

JUDGE SMITH: And what the Court indicated there was, that that problem is even exacerbated when you have a limited fund because there's more potential for conflict to the interest.

MR. INSELBUCH: I beg your pardon, to the contrary. I think what the Supreme Court was saying in that language was no one says we have a limited fund here. When we have a limited fund, we must accept some limitation on all rights in order to accommodate all the claims against the fund. There was no such claim in *Amchem*.

JUDGE DAVIS: Would you address that language in the Court's opinion?

MR. INSELBUCH: Yes, Your Honor. It's page 117 Supreme Court at 2251, Your Honor. Thank you. The two sentences read, "The disparity between the currently injured and exposure only categories of plaintiffs and the diversity within each category are not made insignificant by the district court's findings that petitioners act as suffice to take claims under the settlement."

And then they say, "Although this is not a limited funds case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit the defendant's liability."

What I read that to mean and the only way I believe — and I submit you can read it logically — is in a limited fund case, there must be allocation decisions because there simply is not enough money to go around. So there must be essential allocation decisions designed to confine compensation in a limited funds case.

JUDGE SMITH: Which heightens the problem that you have between the competing interests.

MR. INSELBUCH: If the competing interests have a right to compete under Rule 23(b)(1)(B), Judge Smith, the quintessential example is the race to the courthouse. The point of Rule 23(b)(1)(B) is to stop the race to the courthouse to put everybody on an equal footing.

Under those circumstances, you certainly do not create a subclass and say, "Well, now we're going to have a race. We're going to have a debate between ones who could have gotten there sooner and the ones who could have gotten there later." Because as *Manville* teaches us, there is no right to more money based on your ability to get their sooner or get their later.

The difference in *Amchem* was that everybody would have gotten -- at least as far as anybody said in that case — everybody was entitled to all their money on whatever basis they were, and it was the settlement in *Amchem* that changed that rule. And it was the negotiation of that settlement, because it changed the way it would have worked in the tort system, that required subclass if you were going to make changes to the detriment of one group or another group.

What we have here is the fact situation itself changes the posture. It triggered the use of 23(b)(1)(B) which has an equitable object, the need to see to it that there's an equitable allocation, a fair allocation that doesn't take the tact forth the race to the courthouse.

Now, let's talk a little bit about the notice issue. *Amchem*, of course, was a (b)(3) class. A (c)(2) notice was given out. A (c)(2) notice must be designed and must successfully meet its task of preventing class members with a reasonable opportunity to elect to opt out. That's all of what the Supreme Court and the Third Circuit were talking about. They were talking about opt out rights.

As the Supreme Court said, even if they fully appreciate the significance of the class notice, those without current afflictions may not have the information or the foresight needed to decide intelligently whether to stay in or opt out.

That's because a (b)(3) class is a convenience class and because a (b)(3) class is there to provide people an opportunity if its more convenient for the class, more convenient for the courts, more convenient for the litigants to litigate their issues together, but at the same time to give those who do not so choose the opportunity to litigate their issues alone.

We have a (b)(1)(B) class. We could not resolve the insurance issues a hundred thousand different ways. We don't have the (b)(1)(B) issues back on remand, but clearly we don't have the ability to create an opt outs. Thus what is the purpose of a Rule 23(e) notice which is the notice we gave here.

It is to give sufficient notice, the best practicable notice under the circumstances, the Supreme Court has said, so that people can respond and come to the courthouse and provide input or objections or whatever. It certainly accomplished that purpose.

If you read the first page of the transcript of the first day of the fairness hearing, you'd find that the courthouse in Tyler, Texas, was overflooded with class members who came to that courthouse to the extent that Judge Parker had to assign another judge to take the overflow in another courtroom to give them an opportunity if they wanted to assert objections.

We had eminent counsel brought to this case, in fact, in the Supreme Court assisted by Professor Tribe from Harvard Law School. There was a fair opportunity, fair notice. The data in the record is extraordinary. 94.2 percent of all television households were reached with this notice on an average of five times. 1.4 million notice packages were delivered.

The notice was effective for its purpose. Its purpose was not to give each and every class member an opportunity to opt out, but to see to it that all of the issues properly raised by the settlement presented would have a fair airing. People would have enough information about it so that the courts could be edified.

A minute perhaps about the pre- and post-'59. I'm not sure I understand what anyone is saying the disadvantages were. I see statistics posted that settlement values for one group at one point in time were higher than the other group. Of course, you blink knowledge of the asbestos industry, you blink knowledge of the asbestos pathology if you think that that proves very much.

The people who are exposed later as of any point in time who had a shorter latency period, cancer, mesothelioma, has a very long latency period. So what you have in a time frame closer to 1959 is an opportunity for the less serious asbestosis cases to come to fruition and come to the courthouse, get litigated, and get settled, while you haven't seen what will come down to the pike, the cancer patients, the mesothelioma patients.

Those statistics certainly don't prove anything. But if we take the Supreme Court's teaching and we say to ourselves, okay, what do we have to see to determine whether there was a conflict under Rule (a)(4)? First we look to the presettlement litigation posture of the parties. What interests did they have in common or what interests did they not have in common? What was the conflict?

Surely the pre-'s and the post-'s had a common interest in a success in the litigation that involved coverage. Fibreboard had entered into a settlement with Pacific, one of its two insurers. Remember, there were two insurance policies that overlapped, each with unlimited coverage.

Fibreboard had settled out one of those policies under an agreement which provided a substantial amount of money for Fibreboard if Fibreboard ultimately prevailed against the others in the insurance coverage litigation. So the post-'59s and the pre-'59s shared the goal of winning the insurance litigation.

JUDGE SMITH: You're saying that there is no conflict between pre- and post-'59, even though they were dramatically different rates prior to this?

MR. INSELBUCH: I say that the settlement rates, the dollar amounts of settlement, points to no evidence of any conflict between them because you have to go back and find out what those dollar amounts mean. I think if you read the trial testimony, you will see that there was very good reasons why pathologically the cases that were come together queue, coming to the courthouse, were very different.

The pre-'59s, you have all the folks who were exposed to asbestos in the Second World War in the shipyards, in the Korean War. Those peoples, their diseases had matured. You have seen their mesothelioma cases, seen their lung cancer cases. You've seen their severe asbestosis cases.

The post-'59s in 1990, you hadn't had anywhere near the same latency period. Remember, post-'59s —

JUDGE SMITH: Well, you've just given us what the differences were. Why shouldn't they be represented by different class representatives?

MR. INSELBUCH: Because that's a distinction without a difference, because that only suggests that the people were going to be compensated in the same way depending on what their disease process was if and when their cases came to the court system. And there's nothing in either the interests of the parties prelitigation, the negotiating power of the people at the bargaining table, or in the settlement itself which puts those people into conflict.

Fibreboard has entered into an agreement with CNA under which CNA would use its best efforts if it was going to settle this case to settle all cases including pre- and post-'59 claims. Fibreboard had entered into an agreement with Pacific II, the Pacific II Agreement providing for substantial amounts of money to be paid to the post-'59s if there was a success in the litigation.

The interests were complement and in harmony throughout. And with all due respect, Judge Smith, it is a mistake to think that the facts of what the cases had been up to a point in time and the relative values of the

settlements would suggest that those relevant values were meaningful later on.

JUDGE SMITH: Well, we all know that in *Amchem* there was no counterpart to the pre- and post-'59. But there certainly was a counterpart here to the currently injured and the exposure only plaintiffs. And the Court spoke very forcefully to the conflict that exists between those two. The Court said that for the currently injured, that those were generously needing payment.

That tugs against the interest of the exposure only claims in ensuring an ample inflation protected funds for the future. You're well acquainted with that language. Are you telling us that the purpose of the current cases is not a conflict? We should simply read it out of existence?

MR. INSELBUCH: I'm saying that conflict did not exist in this case at all. In *Amchem* it did not exist until they entered into a settlement agreement. Because in the settlement agreement in *Amchem*, they provided for those distinctions, and that's what the Supreme Court and the Third Circuit found to require a subclassing.

I come back to what I said before. Where you have a limited fund and no one has any right to a preference over anyone else, there is no conflict between the people because the rule of law is that they should all be treated the same. And they should all be equitably allocated a share of the grease without respect to whether or not they could win the race to the courthouse or else there would be no equitable rule.

JUDGE SMITH: So there cannot be a conflict in a limited funds case is what you're telling us?

MR. INSELBUCH: I'm not saying that. There can be other conflicts in a limited funds case, but not conflict simply because one litigant perhaps in State A where they have a one-year trial docket and can get a judgment quicker than a litigant in State B where perhaps they have a five-year trial docket. That's not the race that is entitled and powered to claim that they have —

JUDGE SMITH: I'm just curious. Give us an example of what kind of conflict you think there might ever be in a limited funds case, assuming this is a limited funds case.

MR. INSELBUCH: I can't think of one offhand. But it can't depend upon why they are there in a limited fund context. It has to have to do with something else. *Manville* would give you the example. *Manville*, the Second Circuit's first opinion, they said if there's an enforceable right. There was *Manville* trust document.

JUDGE SMITH: Let me ask you another question while you have time. Is there anything left in this circuit of the *Corrugated Container* case insofar as it's relevant to the case that we're discussing today?

MR. INSELBUCH: Yes. I think the Supreme Court was saying that settlement funds are okay, settlement only classes are okay; however, they don't trump the (a)(2), (a)(3), and (a)(4) requirements of the Rule. They must be looked at in the absence of the settlement, but that look-see is illuminated by the settlement as well. I see my time is up.

JUDGE DAVIS: Thank you. Mr. Wachtell.

MR. WACHTELL: If it please the Court, this court originally held that this case was plainly different and distinguishable from *Amchem*. The question now before this court is is there anything in *Amchem* that says you've got it wrong. And I respectfully submit that the answer is no.

Indeed, and Mr. Baughman said that if you look at the language in *Amchem*, the language is there for a purpose. Yes, we should look at the language in *Amchem*. Over and over, the Supreme Court went out of its way to emphasize that this case, which I was well aware of, was different from *Amchem*. You find that repeatedly in the Supreme Court opinion itself.

JUDGE SMITH: Then I really wonder why the Supreme Court didn't just put us to all this trouble of vacating all the work that was done with the panel opinion and sending it back. And it seems to me if it's irrelevant,

they wouldn't have done that. They were certainly well aware of this case because they referred to it so many times I've lost count.

MR. WACHTELL: Your Honor, there is a wealth of precedent in the fact that a GVR from the Supreme Court is not a direction to the Court of Appeals to reverse itself.

JUDGE SMITH: But the Supreme Court has told us over the last two years what a GVR means is that there is a substantial likelihood that we on remand will find that this court previously was in error.

MR. WACHTELL: Your Honor, I've taken a look at the circuit since the Supreme Court decision. The Second, Fourth, Seventh, Ninth, and this court have each on remand stuck by previous decisions. And I think Justice Scalia's remand decision is not a decision to remand. There's been no departure from previous practice that the Supreme Court GVR is not a dictate to the Court of Appeals to reverse itself.

Your Honor, that is the prior practice. And, indeed, the Fifth Circuit, Judge Reavley was on the panel that stuck by its guns on the previous one. And at least one of these cases, obviously it's a fairly recent history, the *Anheuser-Busch* case, the Supreme Court subsequently denied certiorari.

Justice Scalia, of course, very specifically set forth on these cases to which Your Honor refers that this is no fault remand. Indeed he was finding fault jurisdictionally. What the Supreme Court was doing because there was no fault remand is to say it was not a determination of error. It is not a signal of error. And I think the Courts of Appeals —

JUDGE SMITH: He was dissenting. He was not speaking for the Court, was he?

MR. WACHTELL: He was not speaking to the Court, but there was no change of practice. And the Courts of Appeals, both before and after that case, have continued when they believe that a Supreme Court case does not impact their prior decision, to stand by it.

JUDGE SMITH: Well, sir, just tell us, what's the bottom line? Why do you suppose this case was sent back?

MR. WACHTELL: This case was sent back because the Supreme Court has a limited docket and does not wish to occupy spaces on certiorari case on cases which they have not had the benefit of the Court of Appeals determination itself of the issues. They have recognized that Courts of Appeals are themselves independent judges appointed in the same way, ratified in the same way, and that they should have first crack at deciding the issues.

This is not a mandate to reverse. And there's never been construed as such either before or since the matter in this case, Your Honor, I respectfully submit. And I would note that what the Supreme Court did not say here, there's not a word in the Supreme Court opinion which questions this court's determination of the proper (b)(1) limited funds case.

And then the Supreme Court went ahead to say over and over (b)(3) is the most adventuresome invasion. (b)(1)(B) and (b)(2) clearly calls for class certification, not clearly called for in the (b)(3) case.

JUDGE SMITH: Well, sir, we need to talk about, then, whether this is a limited funds, as we determined earlier. And we had indicated that we would be entertaining some discussion on the question of whether the purchase by Owens-Corning has any effect on the limited funds aspects of this case.

MR. WACHTELL: It does not, Your Honor. Fibreboard continues to be a separate subsidiary. It was not merged into Owens-Corning.

JUDGE SMITH: Well, for one thing, the district court considered in this case, and we did, the assets were considered to be approximately 250 million, as I recall.

MR. WACHTELL: Yes, sir.

JUDGE SMITH: And yet the sale was 500 million, I believe. Am I correct?

MR. WACHTELL: I frankly do not have the number in mind. But corporate finances and what acquirers are

prepared to pay for a company because of business advantages it may give does not mean that there are assets there for the claimants.

JUDGE SMITH: But it certainly means that the amount of money that the district court was looking at was substantially greater than what that court thought.

MR. WACHTELL: No, I do not think that subsequent events years after the fact retroactively mean that the facts that existed before the Supreme Court were wrong, by any stretch of the imagination.

JUDGE SMITH: Well, it certainly might call for a redetermination or a remand to the district court. But let me ask you one other thing in this regard. I understand that last Friday, Owens-Corning and Fibreboard jointly filed suit against the tobacco companies citing as one of their reasons the fact that they were going to be paying compensation under the settlement that we're involved with here today and that they are suing for billions more from the tobacco companies in order to, I guess, enrich the amount of money that's available.

It seems to me that that completely blows out of the water the prior analysis by the district court as to whether this is a limited fund, because such tobacco suits could indeed bring billions of dollars more into this case which would remove any need to even talk about limited funds.

MR. WACHTELL: Your Honor, with respect — and may I also say I represent the tobacco companies who will be on the receiving end of that; so perhaps I speak with bias. But with respect, I do not believe they do have a continuing reexamination of findings on subsequent events of class certification.

And the fact that somebody chooses to file a complaint, which I may say has not been adjudicated and I for one do not think there's any validity, I do not believe that it's a cause for reexamining determinations that were made years ago by the district court.

JUDGE SMITH: According to the news report, the public statement that was made again by Owens-

Corning and Fibreboard, as I understand you're speaking on behalf of today in oral argument — you were said to be representing them.

MR. WACHTELL: I don't represent Fibreboard. I represent the insurance company.

JUDGE SMITH: But you're here. No one's here on behalf of Fibreboard, and I'm asking you about this because it affects the limited funds aspect. Apparently, what Fibreboard and Owens-Corning publicly said was lawsuit was filed in part because the independent trustees of the Fibreboard settlement trust have urged the company to take steps to protect any trust rights or claims that might be lost or limited by currently proposed tobacco settlement, referring specifically to trust funds in this case.

MR. WACHTELL: Yes, sir. I don't think that affects the limited funds that were determined so many years ago whatsoever, the fact that people bring a lawsuit to protect conceivable rights. That I may just as well point, Your Honor, the tobacco industry said there's been agreement to cut off any such claims assuming that Congress ratifies it, and that we can debate what may or may not happen in lawsuits or in Congress.

You have a lawsuit. People claim rights. You have settlement. Congress will cut off rights. And you're right back where you were three years ago, Your Honor. I don't think you can determine this on people's claims or news reports of claims that people are making with respect to that.

Let me very briefly turn to the issue of commonality and typicality. I was quoted as saying that the class could not have brought a lawsuit here. I don't believe that's accurate. In fact, I'm looking at the transcript of the *Rudd* arguments. This is the next day on *Rudd*.

Quote, I think it would be reasonably clear and quite clear that the members of the class would be able to maintain their own declaratory judgment action and would have standing to do so against the insurance companies. What I may well have said in *Ahearn* is that

I do not think that members of the class would have brought individual damage actions by way of class and litigated them.

And that is indeed our position, that you could not have litigated individual damage claims. But as this court determined and as the district court determined, the settlement does not litigate individual damage claims and why the settlement cannot supply the requisites of commonality and typicality. And that is the teaching of the Supreme Court in *Amchem*.

The settlement can remove issues, for example, the individual adjudication of damages that would exist in a litigation context but do not exist in the settlement context by virtue of the settlement.

And that is precisely what this court quite accurately pointed out in its prior opinion, that this settlement was not litigating the individual claims, that it was providing for a fund where everybody had a common interest and a typical interest and for an equitable determination.

JUDGE SMITH: The Supreme Court said that there are times when post-settlement classes sometimes warrant more, not less, caution on the question of certification.

MR. WACHTELL: I think the entire thrust of the Supreme Court opinion is that the close scrutiny — and they say this over and over — is reserved for (b)(3) cases which are the ones where you're reaching where you have simple convenience and you do not have a need. And I think that is the teaching of *Amchem*.

JUDGE SMITH: Certainly the adequacy of representation issues cut across all class actions.

MR. WACHTELL: They do, Your Honor, but they are different, as Mr. Inselbuch pointed out. But let me say just a comment with regard to the pre-'59s and the post-'59s. If it really is a disabling conflict between representing pre-'59s and post-'59s because they have different interests and one theoretically was favored or not, how can Mr. Connor be here in this courtroom representing both of them?

He said there are 70 percent in one cast and 30 percent in the other. If that's really a disabling conflict, it's a disabling conflict of counsel.

JUDGE SMITH: You just told us that you're here on behalf of the insurance people and can't speak on behalf of Fibreboard and what they said in the public press release. I don't see any difference.

MR. WACHTELL: With respect, Your Honor, I do. I represent the insurance companies here and only the insurance companies. Mr. Connor has said there's a disabling conflict between pre-'s and post-'s; yet he says that he's representing both of them. Now, if half of them are prejudiced by this suit, how can he be challenging the result here?

Your Honor, I do not think that there is an adequacy of representation issue here. If I may have another 30 seconds. You have very specific findings of fact by the district court here on the specific facts of this case that there were no conflicts, that there were no disabling conflicts. The district court relied on the expert testimony before it. This court found that —

JUDGE SMITH: That was true in *Amchem*. In *Amchem*, I believe, it was the same expert who testified and the Supreme Court made no mention of it but, in fact, decided the adequacy of representation issues as a matter of law, not only of fact.

MR. WACHTELL: You have the same expert, and there were very, very different facts. Here you have this court who has expressed and ruled that the district court did not abuse its discretion by making these findings of fact. You had no such determination by the Third Circuit which I believe in no way ratifies the district court's determinations there.

Here you have very specific findings of fact on the facts of this case with respect to both pre- and post-'59 claims and the near and far future claims. Let me say on this near and far future claim.

JUDGE SMITH: Let me just ask you one other question. I referred the prior counsel to the question of whether

Corrugated is still good law. And I realize you don't always litigate in this circuit, but it's certainly important to us as far as continuing the litany the *Corrugated* case has.

In your original brief in this court you made the following statement. I'm just going to read. I'm not going take a lot of time on this. You said, "Moreover, the *in re Corrugated Containers* decision directly holding the court's fairness review provide sufficient protection for Class (b) members in the face of the alleged conflict of interest." Is that statement still valid in the wake of *Amchem*, in your view?

MR. WACHTELL: I think that on the question of fairness, it may well be. You have nothing in the Supreme Court opinion. The Supreme Court is talking about typicality, commonality, adequacy of representation. That may still be good law, but in any event it is not necessary to the conclusion here because neither the district court in this case nor this court did not remotely rely upon the fact that the fairness of the settlement was sufficient for adequacy.

You had very specific findings here quite-apart from the fairness of settlement. This case was never defended in the district court on the basis of a fair settlement. Okay, you've got a fair settlement, adequacy, commonality, typicality issues. To the contrary.

The Third Circuit and the district court where the four bases was, found that the elements were supplied and satisfied by the settlement.

JUDGE SMITH: You've answered my question. I was just asking you about *Corrugated Containers*, and you said they relied on it so —

MR. WACHTELL: If I may —

JUDGE DAVIS: You're out of time.

MR. WACHTELL: Thank you very much.

JUDGE DAVIS: Mr. Baughman.

MR. BAUGHMAN: With respect to adequacy of representation, Your Honor, I appreciate Mr. Inselbuch's candor with the court. He said if there's an enforceable

right that exists on behalf of certain class members, then that class would be cut off and notified by the class action. Then there would be a conflict between class members that required separate representation for the two groups.

That is exactly what the conflict between those who are currently injured and those who have not yet suffered an injury is. That's what the *Amchem* court held. There is no difference between the facts in *Amchem* and the facts in *Ahearn* with respect to that conflict, except for the fact that there is an allegation here that there are limited assets available, which as *Amchem*'s circuit court pointed out, it actually exacerbates that conflict.

Mr. Inselbuch says that there is no enforceable right to race to the courthouse, but he cannot deny that the common law rights of Mr. Ortiz and others who are currently injured, absent this injunction, absent this class certification, are to go to the courthouse, get a judgment, and enforce it. Gerald Ahearn can do absolutely nothing about that.

It's a substantive common law state right that is being cut off by this proceeding which raises the Rules Enabling Act problem. If this were truly a limited funds case, if there really was an res over which the district court exercised jurisdiction, then there wouldn't be a substantive enlargement or modification of rights going on because the rights of each class member against the rate are limited by the res itself and by the competing claims of other people. But this isn't such a case, an *in personam* damages case.

And Mr. Wachtell is also candid with the court. He said with respect to commonality and typicality issues here, that we would not be able to maintain individual damages claims as a class action. Your Honor, they keep over and over throughout this litigation acting as if it is an insurance coverage case and that's all it's about.

If that were all this was about, I would not be here except perhaps to cheer them on with respect to Fibreboard's securing insurance coverage.

JUDGE SMITH: Don't you think that's just an effort to divert attention from the issue of conflict within the class?

MR. BAUGHMAN: It's an effort to divert attention from the issue of conflict within the class and the fact that the certification in this case had as its primary purpose an adjustment of substantive rights which violate the Rules Enabling Act. This case modifies the substantive rights of Gerald Ahearn. It modifies the substantive rights of my clients, vis-à-vis one another, that violates the Rules Enabling Act.

And it points up the conflict between the group that currently could go out, absent this case, and get a judgment and those that couldn't because they're not sick yet.

Mr. Wachtell also said that the settlement can't supply commonality and typicality, and then he said something that I don't understand about the settlement here is supplying the commonality and typicality. It's removing it. That's just a bunch of mumbo jumbo, Your Honor.

The settlement here, just as the settlement in *Amchem*, does not liquidate any individual class members' claims. But what it does do is impose substantive limitations on those class members' claims through an equitable distribution process that's different from what their substantive rights as provided under the common law of the 50 states and other jurisdictions in the commonality principal — Puerto Rico.

And that is an adjustment that this court cannot allow under the Rules Enabling Act, it cannot allow under the Rule 23, and it cannot allow under — there is no commonality and typicality with respect to the individual damages claims themselves as opposed to the interests in the insurance coverage litigation which is not the subject of this case.

Now, seven years ago, Judge Higginbotham writing to this court *in re Fibreboard* said the asbestos case is quite powerfully for invasion and judicial creativity. The arguments favoring such invasion are compelling. But

they are better addressed to the representative branches of Congress and the state legislature. The judicial branch can offer the trial lawsuits. It has no power or competence to do more.

That statement by Judge Higginbotham has been echoed by Justice Ginsburg and five other members of the United States Supreme Court who said that the argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure feel and efficient means of compensating victims of asbestos exposure.

Congress, however, has not adopted such a solution. And Rule 23 must be interpreted with fidelity to the Rules Enabling Act and apply the interests of equity factor which in close view cannot fare without large load. So for all these reasons, this court must reverse and remand with direction to the district court to decertify the class.

JUDGE DAVIS: That's the end of arguments, and this court will recess until the first Monday of December.

(Whereupon the proceedings
were concluded at this time.)

(Certificate of Reporter omitted)

ORDER

(CITE AS: 117 S.Ct. 2503)

138 L.Ed.2d 1008, 65 USLW 3611,
65 USLW 3851, 65 USLW 3860

(United States Supreme Court)

(Dated June 27, 1997)

(James FLANAGAN and David H. Middleton, Petitioners, v. Gerald AHEARN, et al. — No. 96-1379; Case below, 90 F.3d 963; 101 F.3d 368)

On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Amchem Products, Inc.* v. *Windsor*, 521 U.S. ___, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

Supreme Court, U.S.
FILED

971695 APR 14 1998

OFFICE OF THE CLERK

No. _____

In The Supreme Court of the United States

October Term, 1997

IN RE ASBESTOS LITIGATION:

JAMES FLANAGAN AND DAVID H. MIDDLETON,
Petitioners,

v.

GERALD AHEARN; JAMES MCADAMS DENNIS; CHARLES W. JEEP; JAMES DRAKE; JUANITA DRAKE; JAMES ELLISON; ROLAND DEARBORN; JUDITH DEARBORN; KERWIN BUTCHER; DIR., WORKERS COMP., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; PAUL COCHRAN; IDA BECK; MARION BEHEE; LONGSHORE INTERVENOR; WILLIAM JAMES MITCHELL; FIBREBOARD CORPORATION; BETHLEHEM STEEL CORPORATION; CONTINENTAL CASUALTY COMPANY; PACIFIC INDEMNITY; FRANCIS MCGOVERN; OWENS-ILLINOIS, INC.; PENN MUTUAL LIFE INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; CNA CASUALTY COMPANY OF CALIFORNIA; CELOTEX CORPORATION; DANIEL HERMAN RUDD, JR., ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; JOHN HANSEL, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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- VOLUME II -

• • •

ON SUGGESTIONS FOR REHEARING EN BANC

(United States Court of Appeals — Fifth Circuit)

(Filed November 26, 1996)

(In re: ASBESTOS LITIGATION — JAMES FLANAGAN, et al., Appellants, VERSUS GERALD AHEARN, et al., Appellees — No. 95-40635; Appeal from the United States District Court for the Eastern District of Texas, Opinion July 26, 1996, 5 Cir., 90 F.3d 963)

Before REAVLEY, DAVIS and SMITH,
Circuit Judges.*

PER CURIAM

The Court having been polled at the request of one of its members and a majority of the judges who are in regular active service not having voted in favor (FRAP 35 and Local Rule 35), the suggestions for rehearing en banc are DENIED.

*** Judges King, Higginbotham, Barksdale, Benavides, and Parker are recused and did not participate in the consideration of the suggestions for rehearing en banc. Judge Dennis also did not participate.**

JERRY E. SMITH, Circuit Judge with whom GARWOOD, JOLLY, JONES, EMILIO M. GARZA, and DEMOSS, Circuit Judges join, dissenting:

I respectfully dissent from the failure of the court to grant rehearing en banc. The result of this litigation, as implemented by the district court and affirmed by the panel majority, is the first no-opt-out, mass-tort, settlement-only, futures-only class action ever attempted or approved. The issues presented are worthy of consideration beyond the level of circuit panel review.

Five of the active judges are disqualified from participating in this matter, and a sixth judge has elected not to participate in the consideration for rehearing en banc. Accordingly, it is not possible to determine whether, if all active judges were voting, a majority would decide to rehear this case en banc.

The applicable statute and rules require the affirmative vote of a majority of the active judges — here, nine of the seventeen active judges — for en banc consideration, as recused and non-participating judges are counted as members of the court for purposes of the calculation.[1] The effect in this case is to require not a

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[1] "Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service." 5TH CIR. R. 35.6. Under 28 U.S.C. § 46(c), rehearing en banc is "ordered by a majority of the circuit judges of the circuit who are in regular active service." *See* FED. R. APP. P. 35(a); *Shenker* v. *Balti-*

(*concluded on page A-69*)

simple majority, but a supermajority of 82% — nine of the eleven participating judges — to favor reconsideration.

That onerous requirement has not been met. Accordingly, the appellants' only recourse, in order to obtain review of the difficult and novel issues presented, is to petition the Supreme Court for writ of certiorari.

(*continued from page A-68*)

more & Ohio R.R., 374 U.S. 1, 4-5 (1963); *Western P.R.R.* v. *Western P.R.R.*, 345 U.S. 247, 250 (1953); *Variable Annuity Life Ins. Co.* v. *Clark[e]*, 998 F.2d 1295 (5th Cir. 1993), *suggestion for rehearing en banc denied*, 13 F.3d 833, 834 (5th Cir. 1994) (Smith, J., dissenting), *rev'd sub nom. NationsBank* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810 (1995).

OPINION

[CITE AS: 90 F.3D 963]

(United States Court of Appeals — Fifth Circuit)

(Filed July 26, 1996)

(In re ASBESTOS LITIGATION — James FLANAGAN; David H. Middleton; Kenneth Smith; Edee Cochran; Esteban Yanez Ortiz; John R. Allgood; Henry William Evers; Lester Eugene Taylor; Plant Insulation Company; Safety National Casualty Corporation, Appellants, v. Gerald AHEARN; James McAdams Dennis; Charles W. Jeep; James Drake; James Ellison; Roland Dearborn; Judith Dearborn; Kerwin Butcher; Dir., Workers Comp., Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor; Longshore Intervenor; William James Mitchell; Fibreboard Corporation; Bethlehem Steel Corporation; Continental Casualty Company; Pacific Indemnity; Francis McGovern; Owens-Illinois, Inc.; Penn Mutual Life Insurance Company; Columbia Casualty Company; CNA Casualty Company of California; Celotex Corp., Daniel Herman Rudd, Jr., on behalf of themselves and others similarly situated; Beverly White, on behalf of themselves and others similarly situated; John Hansel, on behalf of themselves and others similarly situated; Appellees — Nos. 95-40635, 95-40694; Appeals from the United States District Court for the Eastern District of Texas)

Before: REAVLEY, DAVIS and SMITH,
Circuit Judges.

W. EUGENE DAVIS, Circuit Judge.

In this consolidated appeal, we consider a number of challenges to the district court's approval of a class settlement of future asbestos victims with Fibreboard along with several related settlements. For the reasons that follow, we affirm the district court's judgment.

I.
BACKGROUND

A. PROCEDURAL AND FACTUAL HISTORY

Fibreboard, primarily engaged in the timber business, also manufactured asbestos-containing products from 1920 until 1971. By the late 1980's, asbestos-related personal injury and death claims against Fibreboard numbered in the tens of thousands. At that time Fibreboard had approximately $100 million in hard insurance assets available to pay these claims. It also had disputed coverage claims against two of its insurers, Continental Casualty Company and Pacific Indemnity. These coverage claims ultimately played a key role in the class settlement.

Continental issued a general liability policy to Fibreboard in 1957 which remained in force for two years. Although the policy had no aggregate limit, it had a per-occurrence limit of $1 million and a per-person limit of $500,000. Fibreboard contended that Continental's policy replaced a similar Pacific policy with a per-claim limit of $500,000 but no aggregate limit.

Fibreboard contended that these two policies provided coverage to Fibreboard for thousands of claimants. This argument rested on Fibreboard's "continuous trigger" theory which maintained that the policies covered Fibreboard if the claimant had been exposed to asbestos at any time before or during the time the policies were in force, provided the claimant at some time was exposed to Fibreboard's asbestos product.

In 1979, Fibreboard and other insureds filed a massive multi-party insurance coverage case in California state court against a number of insurers, including Pacific and Continental. Following years of litigation, including a trial extending over four years, Fibreboard prevailed in the trial court. In its 1990 opinion, the trial court accepted Fibreboard's continuous trigger theory as well

as Fibreboard's argument that the insurer was required to pay the full cost of defense for each claim covered.

The insurers appealed to a California intermediate appellate court. Argument was held in August 1993 while the settling parties in this case were attempting to reach a final agreement.

By 1988, Fibreboard had largely exhausted its coverage from insurers other than Pacific and Continental. It was unable to pay asbestos judgments and settlements as they occurred and also pay the continuing mounting defense costs. After the trial court in the coverage case issued several rulings in favor of Fibreboard, Fibreboard was able to develop a "structured settlement" program where payments to settle claims were deferred until resolution of the coverage case. Under this plan, most plaintiffs agreed to accept 40% cash up front with the balance due upon resolution of the coverage dispute. Additionally, Fibreboard agreed not to dissipate its assets and, in effect, to give the company to the plaintiffs if it lost its coverage case.

By mid-1990, Fibreboard's defense costs and settlement payments had mounted and Fibreboard looked for additional insurance resources. It proposed to both Continental and Pacific that they negotiate a complete settlement of its coverage claims. Continental declined to negotiate. Pacific, however, negotiated with Fibreboard and ultimately agreed to a settlement, "the Pacific Agreement." By this settlement, which was subject to a number of contingencies, Pacific's coverage was made available for claimants exposed to Fibreboard's asbestos products after 1959. The Pacific Agreement also purported to extinguish Continental's right to seek contribution from Pacific. Continental challenged this agreement in the District Court for the Eastern District of Texas in April 1993.

Even with the Pacific Agreement, Fibreboard faced acute problems with increased large-scale asbestos liti-

gation. In early 1991 it proposed an "assignment settlement" plan to plaintiffs' counsel. Unlike the earlier program, this plan allowed asbestos claimants to settle their claims against Fibreboard for an agreed sum, receive no cash up front but rather receive an assignment of Fibreboard's rights (to the extent of the settlement) against Continental. Fibreboard agreed to pay the settlement sum if the court ultimately exonerated Continental. Under this plan, the settlement was also contingent upon Fibreboard obtaining court orders validating its right to make an assignment in the face of an insurance policy provision barring Fibreboard from settling claims without Continental's consent. Plaintiffs' counsel recognized the risk that their clients would never receive the agreed-upon settlements under the assignment plan and pressed for higher settlement amounts for accepting this risk. Fibreboard, using Continental dollars, was willing to pay more. As a result, the average per-case settlement amount under the assignment plan more than doubled the average amount of the earlier structured settlements. Continental strongly disputed Fibreboard's right to make these assignments. This dispute led to further costly litigation.

In June 1992, a California trial court in *Andrus* v. *Fibreboard*[1] ruled in favor of Fibreboard and upheld Fibreboard's right to make the assignment settlements. The California intermediate appellate court denied writs, relegating *Continental* to review under the ordinary appellate process.[2]

In 1990 and 1991 Fibreboard broached the subject of a global settlement with Ron Motley, Joe Rice, Steven

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1 No. 614747-3 (Alameda Cty. Sup. Ct. June 1, 1992) reversed by *Fibreboard Corp.* v. *Continental Casualty Co.*, No. A059716 (Cal. App., October 19, 1994).

2 The trial court's decision in *Andrus* was reversed by the California appellate court in October 1994 after the Global Settlement Agreement was reached but before the fairness hearing was held.

Kazan and Harry Wartnick, all of whom were leading plaintiffs' asbestos counsel. Fibreboard proposed to use an assignment plan to accomplish the global settlement. Fibreboard sought to structure the settlement so that claimants would look only to its insurance assets if it won the coverage case and Fibreboard would give the company to claimants if it lost the coverage case. As Fibreboard's counsel later admitted at the fairness hearing, this approach was designed in part to "bring the [asbestos] litigation closer to Continental; it was important that Continental feel as threatened as Fibreboard did."

Fibreboard was not successful in negotiating a global settlement with plaintiffs' counsel. Fibreboard and the Ness Motley firm did, however, agree to settle at least 20,000 present asbestos claims with the possibility of expanding that number to a higher figure. Fibreboard again agreed to assign rights under the Continental policy instead of paying cash to fund this settlement. The higher settlement amounts necessary to accomplish these assignment settlements caused a further inflation of settlement values. With the conclusion of this Ness Motley settlement agreement, Fibreboard had entered into $943 million in assignment settlements during 1992 and had deferred settlement obligations at the end of that year aggregating over $1.2 billion, a sum that greatly exceeded its net worth.

As called for under this latest settlement, Fibreboard brought suit in the Eastern District of Texas seeking a determination that the assignment did not violate the Continental policy. Plaintiffs' counsel advised Continental that they had bound themselves contractually with Fibreboard to refrain from negotiating directly with Continental without Fibreboard's consent. Continental knew that Fibreboard and plaintiffs' counsel were actively engaged in negotiating a global settlement to be funded with Continental's money.

Thus, at the beginning of 1993, Continental was under intense pressure to join the settlement talks:

- Continental had been unable to obtain immediate review of the California trial court judgment in *Andrus* approving the unilateral assignment settlements.
- Fibreboard continued to close more and more assignment settlements at amounts Continental considered grossly excessive.
- Fibreboard and plaintiffs' counsel were seriously negotiating a multi-billion dollar settlement which Continental would be called upon to fund. And Continental was barred from the table.
- A new proceeding, in a forum Continental probably considered unfriendly, had been filed seeking validation of Fibreboard's assignment settlements.

In February 1993, Continental announced that it would seek a global resolution of its asbestos exposure under its Fibreboard policies. With the approval of the parties, Judge Parker named Judge Patrick E. Higginbotham of this court to serve as settlement facil'tator.

In the settlement discussions with Judge Higginbotham, Continental made it clear from the beginning that it would only entertain a global settlement if the settlement brought "total peace." Continental was unwilling to pay billions in settlement and forego its substantial arguments against coverage without the assurance that it did not face unknown liabilities in the future. Thus, Continental was only interested in exploring a mandatory, non-opt-out settlement. Continental considered that an opt-out class presented it with a number of insurmountable problems:

- Because the deadline for opting out would likely come after a decision in the coverage appeal, plaintiffs would enjoy a one-way option: they could opt out if Continental lost the appeal but remain in if Fibreboard lost.
- Claimants with the most serious injuries were likely to opt out in disproportionate numbers.

* Accurate predictions of Continental's exposure to opt outs were extremely difficult, if not impossible, to make.

Skirmishes between Continental and Fibreboard initially prevented fruitful discussion. Fibreboard argued that Continental was barred contractually from direct discussions with plaintiffs' counsel. Fibreboard also threatened to continue its assignment settlements.

With Judge Higginbotham's help, the parties agreed to put these impediments behind them in an agreement signed on April 9, 1993. Fibreboard agreed to allow Continental a place at the negotiating table and to stop the assignment settlements. Continental agreed to fund 100% of any global settlement (Continental reserved the right to get whatever contribution it could from Pacific) and to use its best efforts to work with Fibreboard to reach a global settlement.

From April until July the parties attempted to negotiate a global settlement but these efforts met with little success. For a number of reasons Judge Higginbotham recommended and the parties agreed that they should first attempt to settle the Ness Motley inventory of some 45,000 present claims. On August 5, the parties reached the "Substitute Ness Motley Agreement" which was approved by the court on August 9.[3]

With the Ness Motley settlement behind them, the parties intensified their efforts to reach a global settlement. The August 27 date for oral argument in the California Court of Appeal in the coverage case injected a sense of urgency into these discussions. Plaintiffs' counsel realized that if Fibreboard lost the coverage

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[3] In the Substitute Ness Motley Agreement, Continental agreed to pay a higher-than-average value per claim with one-half due at closing and the remainder contingent on the outcome of the coverage case or on the existence of a settlement. This agreement was used as a model to settle inventory claims of other law firms.

case, Continental's funds, essential to any settlement, would be lost. Fibreboard faced immediate bankruptcy if it lost the coverage case. Continental and Pacific faced staggering liability in an unquantifiable amount if they lost the coverage case. The parties had reason to believe that the California appellate court would render a decision promptly after argument and perhaps give signals at argument on how it would rule. For these reasons all parties were driven to reach a settlement before the California court reached a decision in the coverage case.

At Judge Higginbotham's request, Judge Parker designated Messrs. Rice, Cox, Kazan, and Wartnick to "negotiate . . . the prospect of a Rule 23(b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard."

A series of intense negotiating sessions followed. The absence of Pacific at the table remained a serious impediment and little progress was made. Over the weekend of August 21-22, faced with an impending trial on Continental's claims to invalidate the Pacific Agreement, Pacific agreed to share responsibility with Continental on a 35.29% to 64.71% ratio. This was the same ratio established by the trial court in the coverage case.

This proved to be the last impediment to an agreement. Continental and Pacific were now negotiating jointly. By August 23, Continental and Pacific (the Insurers) had offered $1.5 billion and plaintiffs' counsel demanded $1.7 billion. The parties asked Judge Parker to assist in a last-ditch effort to reach agreement before August 27.

Judge Parker and counsel spent the afternoon of August 26 in intensive negotiating sessions in an attempt to resolve the remaining differences between the parties. Late in the afternoon when settlement had not been reached, Judge Parker invited a core group of attorneys to his home outside of Tyler to continue the discussion.

After several hours of negotiations in this more informal setting, Continental agreed to contribute an additional $25,000,000 and Fibreboard agreed to contribute $10,000,000. Plaintiffs' counsel refused at this point to accept the $1.535 billion pot. But later, the key parties, by coincidence, met around midnight at a Tyler coffee shop. Plaintiffs' counsel, at that time, agreed to accept the tendered $1.535 billion global settlement offer.

On the morning of August 27, plaintiffs' counsel renewed a demand that there be a separate, back-up settlement between Fibreboard and the Insurers for the settlement of the coverage case if, for any reason, a court declined to approve the global settlement. The parties negotiated the entire day on August 27. Near the end of the day a settlement (termed the "Trilateral Settlement") among Continental, Pacific and Fibreboard was reached. These negotiations were undoubtedly shortened because the coverage case appeal was argued on the morning of August 27. The negotiating representatives received word after the argument that the court had announced that it intended to decide the case expeditiously.

Upon announcement of the settlement agreement in open court in Tyler on August 27, the parties directed communication to the California Court of Appeals advising the court of the agreement in principle. The parties asked the California court to defer a ruling on the issues relating to Fibreboard's dispute with Continental and Pacific pending completion of the necessary settlement documentation. The California Court of Appeals has continued to withhold a ruling pending final approval of the Trilateral Settlement.[4]

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[4] **After oral argument, the court granted a motion to sever issues unique to Fibreboard, Pacific and Continental in order to facilitate the Trilateral Settlement. Its decision regarding the claims of other participants in the case is *Armstrong World Industries, Inc.* v. *Aetna Casualty & Surety Co. et al.* , 45 Cal.App.4th 1, 52 Cal.Rptr.2d 690 (1996).**

The parties then set out to convert the Global and Trilateral Settlements into formal written agreements. They first addressed the Trilateral Settlement. Disputes arose over critical features of this agreement and it was not until October that Continental, Pacific and Fibreboard were able to reduce it to writing.

On September 9th, the *Ahearn* class action was commenced by the Global Health Claimant Class against Fibreboard. The Global Health Claimant Class consists of all persons with personal injury claims against Fibreboard for asbestos exposure whose claims had not been brought in a lawsuit, settled or included in a settlement agreement before August 27, 1993. Shortly after *Ahearn* was filed, Judge Parker entered a number of orders: Continental and Pacific were granted leave to intervene as party defendants; provisional class certification was granted; a TRO against commencement of further separate litigation against Fibreboard by putative class members was entered; and the court appointed as counsel to the plaintiff class, Rice, Cox, Kazan and Wartnick, and appointed Caplin & Drysdale as counsel to plaintiffs' counsel.

In October, Judge Parker appointed Professor Eric Green of the Boston University School of Law to serve as guardian ad litem for the class. Judge Parker noted

> that it would be desirable that there be the appointment of [a guardian] ad litem who is fully knowledgeable in asbestos mass tort matters but does not actively represent asbestos claimants. The function of the [guardian] ad litem is to review the settlement from the point of view of members of the class and thereby to afford the class additional assurance that their interest will be adequately protected.

Professor Green was directed to render a report to the court analyzing the fairness, reasonableness and adequacy of the settlement from the point of view of the members of the provisionally certified Global Health Claimant Class.

Plaintiffs' counsel then turned to documenting the Global Settlement Agreement. The parties did not resolve the hundreds of details necessary to complete this document until December 23. As Judge Parker noted, it was not until that date when the Global Settlement Agreement was signed that it became "clear that a final agreement would actually be reached."

B. TERMS OF THE SETTLEMENTS

1. The Global Settlement Agreement

The Global Settlement Agreement provides for the establishment of a trust, funded with $1.535 billion — the proceeds of the settlement. The trust is charged with administering and paying all of the Global Health Claimant Class members' asbestos-related personal injury and death claims against Fibreboard and the Insurers. Once the global settlement receives judicial approval, and the trust is fully funded, the Class members' claims against Fibreboard and the Insurers will be directed to the trust for processing and payment according to the procedures provided in the trust distribution process. The trust is to be managed by three trustees and subject to the general supervision of the court.

The Global Settlement Agreement seeks to provide, through the trust, a simple process for injured persons to quickly obtain a fair resolution of their claims and at the same time safeguard their ultimate right to resort to the tort system. The settlement further seeks, through spendthrift provisions, to limit the amount of the trust assets that can be paid out in any given year. This will protect assets so that they will be available to compensate injured class members whose claims develop far in the future. If a shortfall occurs in any year, payments during that year are prioritized so that the sickest claimants are paid first.

Under the Global Settlement Agreement, a claimant must first seek to settle with the trust after providing

requisite information to allow for evaluation of his claim. If no settlement is reached, the claimant will next proceed to mediation to attempt to resolve his differences with the trust. If the mediation fails, the claim will be submitted to arbitration, either binding or non-binding at the claimant's choice. If non-binding arbitration does not result in a resolution of the claim, a judge or judge's designee from the Eastern District of Texas will hold a settlement conference. If this does not produce a settlement, the claimant may proceed against the trust in the tort system, complete with a jury trial if requested. The recovery of the claimant in the tort system, however, is subject to a cap of $500,000 per claim and recovery of punitive damages is precluded. Attorneys' fees for claimant's counsel are limited to 25% of the compensation paid to the claimant. Any resulting judgment will be paid out over a period of years depending upon the financial condition of the trust at the time.

As consideration for their $1.535 billion payment, Fibreboard and the Insurers receive full releases from the Global Health Claimant Class for their asbestos-related claims. Fibreboard and the Insurers also release each other from all claims.

2. The Global Third-Party Claimant Class Settlement

This settlement is between representatives of Fibreboard's major co-defendants on the one hand and Fibreboard and its Insurers on the other. The settlement preserves credit rights for co-defendant third parties under the law of the forum. Where the claimant liquidates his claim against the trust before proceeding to judgment against the co-defendant third party, the third party receives whatever credit local law allows against the judgment. Any third-party co-defendant who suffers a judgment before the trust settles with the plaintiff and pays a Fibreboard share, succeeds to the plaintiff's rights against the trust, except for exit to the tort

system. The Global Third-Party Claimant Class releases Fibreboard and the Insurers as to all third-party claims for contribution and indemnity arising from the claims of Global Health Claimant Class members and agrees that approval of the Global Settlement Agreement will bar and enjoin Global Third-Party Claimant Class members from prosecuting any such claims against Fibreboard or the Insurers. Fibreboard and the Insurers in turn, release the Global Third-Party Claimant Class from any and all contribution and indemnity claims.

3. The Trilateral Settlement Agreement

The Trilateral Settlement Agreement compromises the longstanding coverage disputes between Fibreboard and the Insurers, Continental and Pacific. This settlement is to remain effective even if the Global Settlement Agreement ultimately fails to obtain judicial approval. With limited exceptions, the Trilateral Settlement fully discharges the Insurers from all of their Fibreboard policy obligations — both personal injury and non-personal injury claims. The Trilateral Settlement is not designed to settle any asbestos claims against Fibreboard. If the global settlement for some reason fails, the asbestos claimants may pursue Fibreboard in the tort system. If the Global Settlement Agreement is not finally approved but the Trilateral Settlement Agreement is, the Insurers will make available to Fibreboard a total of $2 billion to enable Fibreboard to defend and resolve asbestos-related claims filed against it.

C. Notice And Hearing

After a comprehensive campaign designed to give notice of the proposed settlements, the district court allowed wide-ranging discovery. The court allowed the Ortiz and Flanagan appellants to intervene to assist in making the record "relating to the fairness, reasonableness and adequacy of the proposed settlement — to assist the court in its ultimate decision in this case."

Thereafter the court held a comprehensive eight-day fairness hearing. In addition to issues relating directly to the adequacy of the settlement fund, the court heard expert testimony on the potential outcome of the coverage case appeal. Two experts, retired California Supreme Court Justice Marcus Kaufman and Yale Law Professor, George Priest, gave opinions that Fibreboard's trial court victory on coverage would be reversed by the California appellate courts. These witnesses testified that Fibreboard faced a substantial risk that its extensive assignment settlement program constituted a massive breach of the policy.[5]

Following the hearing, the court made detailed findings and concluded that the Global Settlement Agreement was fair, adequate and reasonable to the class and that the requirements for mandatory class certification under Federal Rules of Civil Procedure 23(b)(1)(A), (b)(1)(B) and (b)(2) were met.

D. RUDD

After the Trilateral Settlement between Fibreboard and the Insurers was reached, the Insurers insisted upon a judicial determination that the settlement was fair, reasonable and non-collusive and operated to terminate any rights claimants might otherwise have against the Insurers arising out of the policies. The *Rudd* action was filed to accomplish this purpose. The Insurers thus brought a declaratory and injunctive action in the Eastern District of Texas against two mandatory (non-opt-out) defendant classes: (1) the Trilateral Health Claimant Class — substantially the same as the *Ahearn* futures class, and (2) the Trilateral Third-Party Claimant Class, comprised of third parties with asbestos-related claims against Fibreboard. The district court appointed experienced counsel to represent each

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5 **See discussion of *Andrus* at note 2 and accompanying text.**

class.[6] Notice was then given to the classes informing them of the pendency of the action. Broad discovery was conducted and trial was held on February 13, 1995.

Following trial, the class representatives and counsel for both of the defendant classes advised the district court that they had concluded that it was in the best interest of these classes to consent to the relief the Insurers were seeking. Counsel filed position papers explaining their reasons. Notice of the class representatives' consent to the terms of the Trilateral Settlement was sent to the members of the two classes. Following a fairness hearing, the district court issued findings of fact and conclusions of law approving the classes' consent and certifying both classes as mandatory non-opt-out defendant classes pursuant to Rules 23(b)(1)(A), (b)(1)(B) and (b)(2) of the Federal Rules of Civil Procedure. Only two individuals represented by Leonard C. Jaques, Esq., challenge the district court's orders in this appeal. No member of the Trilateral Third-Party Claimant Class and none of the other intervening parties in *Ahearn* have lodged objections to *Rudd*.

II.
AHEARN

Appellants challenge *Ahearn* on a number of grounds which we consider below. The Ortiz intervenors are members of the Global Health Claimant Class who challenge certification of the class and the approval of the settlement. The Flanagan intervenors, also members of the Global Health Claimant Class, challenge certification in *Ahearn* and raise several objections specific to *Rudd*. We will refer to both groups of appellants collectively as "the intervenors."

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6 **Class counsel for the Trilateral Health Claimant Class was James E. Coleman, Jr., of the law firm Carrington, Coleman, Sloman & Blumenthal, L.L.P. Class counsel for the Trilateral Third-Party Claimant Class were the same attorneys that represented the Global Third-Party Claimant Class.**

A. RULE 23(A)

Rule 23(a) lists four prerequisites to a class action: (1) numerosity, (2) commonality, (3) typicality and (4) adequacy of representation. The district court found that all four of these prerequisites were satisfied. The intervenors do not dispute the district court's finding of numerosity, but argue that the Global Health Claimant Class meets none of the other prerequisites to a class action.

The intervenors argue that the district court erred by considering the circumstances surrounding the settlement and the evidence adduced at the fairness hearing in making findings under Rule 23(a). This argument is contrary to Fifth Circuit precedent and would require a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class. In *In re Corrugated Container Antitrust Litigation (Container I)*, we held that the district court should consider the settlement in deciding whether the settlement class satisfied the prerequisites of Rule 23. 643 F.2d 195, 211 (5th Cir.), *aff'd*, 659 F.2d 1322 (5th Cir. 1981), *cert. denied*, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294, and *cert. denied*, 456 U.S. 1012, 102 S.Ct. 2308, 73 L.Ed.2d 1309 (1982). We rejected a challenge to the district court's finding that the class was adequately represented as required by 23(a)(4) and found that the terms of the settlement were vitally important to the determination that certification was appropriate. *Id.*

Most circuits to decide the issue have held that courts should consider the settlement in determining whether Rule 23 prerequisites are satisfied. See *Malchman* v. *Davis*, 761 F.2d 893, 900 (2d Cir. 1985) (certification appropriate because "the interests of the broadened class *in the settlement* were commonly held") (emphasis added); *White* v. *National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) *cert. denied* ___ U.S. ___, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995) ("adequacy

of class representation . . . is ultimately determined by the settlement itself"); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1543 (11th Cir. 1987) ("in assessing the propriety of class certification, the courts evaluate the negotiation process and the settlement itself"); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir.) *cert. denied*, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989) ("if not a ground for certification per se, certainly settlement should be a factor, and an important factor to be considered when determining certification"). Only the Third Circuit has refused to look at settlements before it when deciding class certification issues and even that court admits that taking the settlement into account may be "the better policy." *Georgine* v. *Amchem Products, Inc.*, 83 F.3d 610, 617-18 (3d Cir. 1996). The rule that a court should consider a proposed settlement, if one is before it, when deciding certification issues makes good sense. Settlements and the events leading up to them add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint. See Herbert Newberg & Alba Conte, *2 Newberg on Class Actions* § 11.28 at 11-58 (3d ed. 1992) (in settlement class context, common issues arise from the settlement itself).

We are bound to follow *Container I*'s holding that the district court can and should look at the terms of a settlement in front of it as part of its certification inquiry. We would adopt this rule even if we were not bound by precedent because it enhances the ability of district courts to make informed certification decisions.

1. Commonality and typicality

The district court, in its findings of fact, found that the entire Global Health Claimant Class had the following issues in common:

> (i) avoiding the potentially disastrous results of a loss by Fibreboard in the *Coverage Case* appeal;

(ii) maximizing the total settlement contribution from Fibreboard and the Insurers; (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transactions costs and delays in compensation; (iv) minimizing the percentage of their compensation diverted from them to pay attorneys' fees; and (v) adopting procedures that provide for payments to claimants in an equitable manner.

The intervenors do not disagree that the settlement class holds these issues in common. Instead, they argue that these issues do not support a finding of commonality because they are derived from the settlement rather than from the *Ahearn* complaint. As we noted above, this argument has no merit and is foreclosed by our holding in *Container I*. Because the evidence is overwhelming that the class holds the above issues in common under the settlement (even the intervenors concede this point), we agree with the district court that the *Ahearn* action and the Global Settlement Agreement presented it with questions of law and fact common to the entire Global Health Claimant Class.

Typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent. *Jenkins* v. *Raymark Indus. Inc.*, 782 F.2d 468, 472 (5th Cir. 1986). The district court found that the legal and remedial theories of the representative plaintiffs were typical of the class because all members of the Global Health Claimant Class presented claims based on exposure to Fibreboard asbestos. The district court also found that the named plaintiffs' interests in maximizing recovery for the class and eliminating the risk posed by the insurance coverage litigation were identical to interests held by all members of the class.

The intervenors do not argue that the named plaintiffs' claims rest on theories different from those of the other class members. Instead, in their attempt to show

that the class is too diverse to meet the typicality requirement, they point to individual issues such as varying family situations, separate histories of cigarette smoking, differences in medical expenses and differences in state law. These differences will certainly result in significant differences in the amount of damages that each claimant recovers but do not affect the settlement in the least. The Global Settlement Agreement does not award damages to individual victims:[7] it provides money and an equitable distribution process to pay victims.[8]

The central remedial and legal theory of each of the named plaintiffs, that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos, is typical of the entire class. Even the definition of the class makes this clear.[9] Further, the issues that brought the named plaintiffs to settle *Ahearn* are the same issues that the district court found common

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7 Determinations of individual damage awards will be made by the trust and the plaintiff's attorney in settlement negotiations or in a full trial on the merits. The back-end opt out provision will force the trust and plaintiffs to consider state law and individual circumstances, such as smoking history, when negotiating damages because the alternative to agreement is a full trial by jury under relevant state law.

8 This is in stark contrast to the *Georgine* case where the settlement attempted to award damages to class members based on the severity of their injuries alone, 83 F.3d 610 (3d Cir. 1996). We would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy the typicality requirements due to the huge number of individuals and their varying medical expenses, smoking histories, and family situations. In *Ahearn*, only commonly held questions regarding insurance coverage for the class' injuries and establishment of an equitable distribution process to insure that all class members receive compensation were decided. As a result, this settlement is unaffected by the typicality and commonality problems cited in *Georgine*.

9 The Global Health Claimant Class consists of persons who have been exposed "to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability . . .."

to the entire class. The named plaintiffs settled *Ahearn* because of their desire to avoid the risks of insurance coverage litigation and to insure that money remains available to pay their claims when they make it through the settlement and/or trial process to final judgment. These same concerns affect each member of the Global Health Claimant Class. We are satisfied that the district court did not abuse its discretion by finding that the issues of law and fact faced by the named plaintiffs were typical of the Global Health Claimant Class.

2. Adequacy of representation

The intervenors argue that the district court should not have certified the Global Health Claimant Class because of impermissible conflicts of interests by class counsel.[10] Rule 23(a)(4) states that a class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class." This requirement for fair and adequate representation encompasses both class representatives and class counsel. *North American Acceptance Corp.* v. *Arnall, Golden & Gregory*, 593 F.2d 642, 644 n.4 (5th Cir. 1979). However, "[j]ust what measure of representation is adequate is a question of fact that depends on each peculiar set of circumstances." *Guerine* v. *J&W Investment, Inc.*, 544 F.2d 863, 864 (5th Cir. 1977), citing *Johnson* v. *Georgia Highway Express Inc.*, 417 F.2d 1122 (5th Cir. 1969). The district court has the continuing duty to see that the class is adequately represented. *Guerine*, 544 F.2d at 864.

A district court may not certify a class without concluding that class counsel are "'qualified, experienced, and generally able to conduct the proposed litigation.' Obviously, an attorney who should be disqualified because of a conflict of interest will not meet this

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10 **Intervenors do not challenge the adequacy of representation of class representatives so we do not consider this issue.**

requirement." *North Amer. Acceptance*, 593 F.2d at 644 (quoting *Johnson v. Georgia Hwy. Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969)).

In August 1993, the district court, on the recommendation of Judge Higginbotham, formally appointed four counsel (Messrs. Rice, Cox, Kazan, and Wartnick) to represent the Global Health Claimant Class. Messrs. Rice and Cox are partners with the Ness Motley firm, one of the leading U.S. firms representing asbestos claimants. Ness Motley has been engaged in litigation with Fibreboard since 1990. Mr. Kazan is a partner with Kazan, McClain, Edises, & Simon. He has handled asbestos-related cases for about twenty years. Mr. Wartnick is a member of the law firm of Wartnick, Chaber, Harowitz, Smith & Tigerman. His practice has been devoted to representing asbestos claimants since 1981. In addition to their experience in asbestos litigation generally, Messrs. Kazan and Wartnick were Fibreboard's chief litigation adversaries on the West Coast, where Fibreboard is located. The appointed class counsel retained the firm of Caplin & Drysdale to advise them in areas outside their own expertise.

The district court found that these counsel are "prominent attorneys, highly respected for their knowledge, experience, skill and special competence in the field of asbestos litigation" and that they provided "adequate, professional and ethical representation" to the class.

The intervenors do not question the skill, competence or experience of class counsel, but instead argue the existence of impermissible conflicts that prevented them from adequately representing the class. Both sides agree that in determining the existence of a conflict, we look to the ABA Model Rules of Professional Conduct for guidance. Rule 1.7 states:

> (b) A lawyer shall not represent a client if the representation of that client may be materi-

> ally limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Model Rules of Professional Conduct, Rule 1.7(b).

At the fairness hearing, the intervenors and the settling parties each called a legal ethics expert to express an opinion on whether class counsel had conflicts.

The intervenors offered Professor John Leubsdorf, a law professor at Rutgers University Law School who has taught courses in civil procedure and legal responsibility. The district court qualified Professor Leubsdorf as an expert on issues of legal ethics and professional responsibility but found him lacking in practical experience in mass tort litigation.

The settling parties called Professor Geoffrey Hazard, a law professor at the University of Pennsylvania Law School and a recognized scholar in the field of legal ethics and professional responsibility. Professor Hazard was a member of the Rand Civil Justice Institute advisory council for studies concerning asbestos litigation and a reporter to the commission responsible for the preparation of the ABA Model Rules of Professional Conduct. Moreover, Professor Hazard has previously testified in asbestos cases and has extensive experience as a consultant in this type litigation.

After hearing the testimony of both the legal experts and the negotiators, the district court credited Professor Hazard's testimony as "consistent with existing federal legal principles and the underlying facts of this case." The court found that Professor Leubsdorf's testimony in a number of areas was either not supported by the factual record or contrary to settled federal law. Also, the district court felt that Professor Leubsdorf's conclusions and recommendations often were speculative and impractical because of his insufficient experience in mass torts and asbestos litigation. The record amply supports these findings.

The intervenors argue that class counsel for the Global Health Claimant Class had impermissible conflicts due to concurrent representation both (1) of present asbestos claimants and the Class of future claimants and (2) of purported conflicting subgroups within the class.

a. Alleged conflict between present claimants and the class

The intervenors contend that class counsel by simultaneously representing both present claimants and the class of future claimants represented clients who were directly competing for Fibreboard's limited resources. The district court found that during the negotiations no conflict existed that materially limited counsel's responsibilities to the future claimant class.

In analyzing whether a conflict existed, both Professor Hazard and the guardian ad litem appointed for the futures class, Professor Eric D. Green, divided the three-year negotiations period into smaller discrete time periods: (1) Early 1991 through April 9, 1993; (2) April 9, 1993, through August 9, 1993; (3) August 9, 1993, through August 27, 1993; (4) August 27, 1993, through October 12, 1993; and (5) October 12, 1993, through December 23, 1993.

(*i*) Early 1991 through late March 1993

Most of the settlement discussions until late March, 1993 were between only Fibreboard and class counsel. The Insurers did not participate. These exploratory discussions focused on a possible settlement with both present and future claimants combined in an opt-out class. Fibreboard was still seeking to settle by assigning its insurance rights to the class. During this time, Fibreboard continued to settle various law firms' "inventories" of present claims, including claims with the law firms of the four class counsel. Again, Fibreboard accomplished these settlements by assigning its insurance rights against Continental and Pacific; thus, these settlements were contingent on a favorable decision for Fibreboard in the California coverage case.

During this period, Fibreboard executed the initial Ness Motley agreement which settled approximately 20,000 inventory claims with the Ness Motley firm. This agreement required Fibreboard to obtain Continental's consent to this assignment of insurance rights or to seek a court order approving the assignment. In January 1993, Fibreboard filed suit against Continental in the Eastern District of Texas to obtain the court order.

Professor Hazard testified that during this time period no conflict existed between the present and future claimants because all discussions of a global settlement included both groups and both groups shared the risk of losing the coverage case. If coverage was found and if assignment was not a breach of contract, then the insurance policies of Continental and Pacific offered potentially unlimited coverage.

(*ii*) April 1993 through August 9, 1993

In March 1993 Continental joined the negotiations and Judge Parker appointed Judge Higginbotham as a settlement facilitator. In an April 9, 1993 agreement, Fibreboard agreed to stop executing assignment settlements and Continental agreed to work toward a global settle-

ment of all present and future claimants, including both pre- and post-1959 exposed claimants. But Continental insisted that the settlement be a mandatory, non-opt-out class and that Pacific contribute to the total settlement fund. Class counsel began to consider a mandatory class, but only if the settlement proceeds were adequate to insure fair restitution to present and future claimants and if a back-end opt-out provision was included. During this period, Continental filed suit in the Eastern District of Texas against both Pacific and Fibreboard seeking a declaration that the Pacific Agreement did not impair Continental's contribution rights against Pacific.

Fibreboard, now joined by Continental, continued negotiations on inventory claims. Specifically, Fibreboard and Continental began negotiations with the Ness Motley firm on a revised Ness Motley agreement. The parties succeeded in reaching the Substitute Ness Motley Agreement on August 5, 1993. Generally, Continental agreed to a higher-than-average value per claim with one-half due at closing and the remainder contingent on the outcome of the coverage case or on the existence of a settlement. Other inventory settlements were modeled after the Substitute Ness Motley Agreement.

Now that Fibreboard's suit against Continental concerning the initial Ness Motley agreement was settled, Continental sought an immediate trial of its suit against Fibreboard and Pacific. Continental's primary objective was to motivate Pacific to join the global settlement negotiations.

The intervenors argue that an impermissible conflict existed because the Ness Motley counsel were simultaneously negotiating for both present claimants (the inventory claims) and the class of future claimants. Professor Hazard testified that the present and future claimants were not competing for the same funds. At this stage of the negotiations, counsel were concen-

trating on the settlement of their inventory of present claims. It is true that they were also discussing a global settlement, but these discussions were in the preliminary exploratory stage. Certainly, at this time, counsel had no well-formed notions of how much Continental was willing to pay to settle the future claims.[11] For this reason, Professor Hazard explained that each attorney in good faith was attempting to obtain the maximum dollar amounts for present claimants he represented, as well as for the future claimants. Counsel certainly knew in a general way that there was a sum beyond which Continental would not pay. But because they did not know that limit, they did not know that this limit would be less than an amount they were willing to accept in settlement for both classes of claimants.[12] As the district court found, the Substitute Ness Motley Agreement likely aided the global settlement by increasing the average value per claim. We are persuaded that the record supports the district court's conclusion that class counsel vigorously represented both the present claimants and their future claimant clients against the same defendant.

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11 As Professor Hazard testified:

> Q. Well, to your knowledge, did the reality ever occur here to the plaintiff's lawyers that there would not be enough money to pay all future claimants?
>
> A. They confronted a situation in which there was an external event creating a severe risk that that could happen. If Fibreboard won the coverage litigation without qualification as to the extent of the coverage, then there was enough money to the extent of the insurance company's resources, which I take it for practical purposes [sic] without limit; that is they would have to charge present policyholders to pay the money, but presumably if they stayed in the business they could do that.

12 Professor Hazard discussed the difference between the real-world concept of conflict of interest with the imaginary concept of a reserve price:

(*concluded on page A-96*)

(*iii*) August 9, 1993, through August 27, 1993

On August 9, 1993, on the recommendation of Judge Higginbotham, the district court appointed Messrs. Rice, Cox, Kazan, and Wartnick to negotiate the prospect of a settlement class composed of future claimants. The court knew that this settlement would have to be reached before the decision in the coverage case, which was expected on August 27, 1993. The court felt compelled due to this severe deadline and to the complexity of the issues to appoint only highly competent and experienced attorneys who understood asbestos litigation. Professor Leubsdorf testified that the court should have required all class counsel to settle their present claims for cash or should have appointed other counsel. The district court did not err in concluding that this suggestion was impractical and would have seriously impeded any settlement.

From August 9, 1993, to August 27, 1993, appointed counsel negotiated a global settlement. On August 22, 1993, Continental and Pacific reached an agreement to settle their dispute, vastly improving the odds of a

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(*continued from page A-95*)

Q. That's your opinion, whether or not there's an ethical violation depends upon the reasonableness of the settlement? Is that right?

A. It depends — I think the judge said — I think I heard him to say the circumstances. That is, the conflict of interest is a real-world concept, not a theoretical concept. Therefore, one has to consider the real-world circumstances. Economists do a lot of thinking about — how shall we say — the potential of reality. A reserve price in the context of real-world negotiation is an imaginary number. The person who offers the money finally doesn't know what he is going to offer until he offers it. He may have the clearest idea, the firmest opinion, the strongest wish, and yet you can have a settlement or there will be a few bucks more. How do you possibly reconcile the notion that he had a firm, irreducible, unremovable, firm reserve price with the fact that he settled for a little bit more? It's because you're talking about different kinds of things.

global settlement. The district court found that all negotiations during this time were vigorous, contentious, and at arm's length. Professors Hazard and Green both testified that the future claimants were not impaired by counsel's representation of present claimants during this period. Indeed, they found that the present claimants had a substantial interest in a global settlement because such a settlement would secure their contingent back-end payments under the Substitute Ness Motley Agreement. Class counsel were also aware that any class settlement must be approved by the court and would face meticulous scrutiny. Thus, the present and future claimants had two common interests in reaching a settlement. First, they both wanted to avoid the risk of Fibreboard losing the coverage case. Second, they both wanted a diligently negotiated settlement: the future claimants wanted the settlement that yielded them maximum dollar recovery; the present claimants wanted a settlement that would withstand intense judicial scrutiny.

(*iv*) August 27, 1993, through October 12, 1993

From August 27, 1993, after announcing the Global Settlement Agreement in principle in open court, until October 12, 1993, when the Trilateral Settlement Agreement was reached, class counsel conducted no negotiations on the terms of the Global Settlement Agreement. On October 12, 1993, the district court appointed Professor Green as the guardian ad litem of the futures class.

(*v*) October 12, 1993, through December 23, 1993

From October 12 to December 23, 1993, when the Global Settlement Agreement was executed, the settling parties negotiated the specific terms of the agreement. By this time, the Trilateral Settlement Agreement had already been executed and would have triggered the back-end payments for the present clients in the Ness Motley or similar agreements even if the global settle-

ment failed. Thus, the present clients' settlement was secured and they no longer had an interest in a global settlement. The record supports the district court's finding that the negotiations during this period were vigorous and that the class was adequately represented.

Thus, the district court considered the intervenors' conflicts argument for the entire time the settlement negotiations were underway and found that, at no time, did a material limitation on the representation of the class by class counsel exist due to concurrent representation of present and future claimants. The court did not err in reaching this conclusion.

b. The alleged intraclass conflicts

On appeal, the intervenors assert only two claims of intraclass conflict: (1) interests of class members who presently have an asbestos-related illness (the "near" futures) and members whose illness will not be apparent for many years (the "far" futures); and (2) interests of class members exposed pre-1959 and members having only post-1959 exposure.

Whether a conflict exists is governed by Rule 1.7(b) as discussed above. Not every intraclass conflict, however, will preclude approval of the settlement for inadequate representation. See *Container I*, 643 F.2d at 207-08.

The district court found that neither subclasses nor separate negotiating attorneys were required because no material intraclass conflict existed. The court found the common interests far outweighed any divergent interests the intraclass groups might have. The court enumerated those common interests as follows: avoiding the catastrophic results of a loss by Fibreboard in the coverage case appeal; maximizing the total settlement contribution from Fibreboard and the Insurers; streamlining the procedures for the filing, processing, and resolution of claims, thereby reducing transaction costs and delays in compensation; minimizing the percentage of their compensation diverted

from the fund to pay attorney's fees; and adopting procedures that provide for payments to claimants in an equitable manner.

Intervenors suggest two intraclass conflicts. First, they argue that the "near" futures would prefer a settlement agreement that places no limits on the amount an individual may recover because these claimants do not anticipate that Fibreboard's assets will be depleted before their claims mature. The "far" futures, on the other hand, would prefer to limit individual claims to conserve funds so that resources will be available to pay for their future illnesses.

Professors Hazard and Green found no conflict between these two groups that would materially impair the performance of class counsel. Specifically, each found that the common interest in avoiding a lack of coverage vastly overwhelmed any differences between these groups. The "near" futures have no assurance that they would fare better in the absence of the Global Settlement Agreement. These claimants would face the risk that Fibreboard would live up to its pledge to actively defend any claims and delay any recovery. These claimants would also face the risk of attrition of available funds from increased legal fees. Under the Global Settlement Agreement the entire class is benefited by the greater likelihood that funds will be available to compensate both "near" and "far" future claimants under a less complicated system.

The intervenors rely on *In re Joint Eastern & Southern District Asbestos Litigation (Findley)*, 982 F.2d 721 (2d Cir. 1992) to support requiring subclasses for the "near" and "far" futures. In a settlement trying to save the Manville Trust from insolvency, the Second Circuit held that subclasses were required for a Rule 23(b)(1)(B) non-opt-out class because of clear conflicts between class members. More particularly, the Second Circuit did require subclasses for groups comparable to our "near" futures and

"far" futures. But the terms of the Manville Trust required that conclusion: significantly, the Second Circuit opinion makes it clear that a "near" future claimant was assured of recovery under the Manville Trust instrument if the claim was filed before the Trust ran out of money because the Trust operated on a strict order-of-filing priority. The settlement abandoned this priority to the prejudice of the near futures. Counsel, in negotiating such a settlement, had a clear conflict between the "near" futures whose recovery rights were secure and the "far" futures who had no such security. As explained above, our "near" future claimants without the Global Settlement Agreement are not assured of a priority payment and have no assurance that funds will be available or when funds can be obtained if they are required to litigate with Fibreboard.

Next, intervenors argue that counsel could not represent claimants who were exposed before 1959 and after 1959 in negotiating a global settlement. They contend that this conflict exists because a pre-1959 exposure claimant's case has a higher settlement value than a post-1959 exposure claimant's. This is premised on the argument that pre-1959 claimants have a greater likelihood of available insurance coverage because both Continental and Pacific insurance policies covered only pre-1959 asbestos exposure. The Intervenors recognize that the Pacific Agreement gave Fibreboard $330 million to use in post-1959 claims. They argue however that Continental affords potential unlimited fund coverage to the pre-1959 claimants.

Professors Hazard and Green both found no substantial conflict between pre- and post-1959 claimants. Both pre- and post-1959 claimants share the common class interests recited above. Neither the Substitute Ness Motley Agreement, the Trilateral Settlement Agreement, nor the Global Settlement Agreement distinguish between these two groups of claimants in any way. To distinguish between the two groups in the Global Settle-

ment Agreement was impractical because the class had no chance of persuading Fibreboard to agree to a settlement that did not address the claims by both groups. Also, to maintain the distinction in the Global Settlement Agreement would have undermined the attempts to provide maximum compensation and an efficient, streamlined process to claimants.

The district court made the following findings of fact: (1) all negotiations were vigorous and at arm's length, often conducted under the auspices of Judge Higginbotham; (2) common interests within the class overwhelmed minimal conflicts; (3) the settlement treated all class members the same; and (4) the Global Settlement Agreement was fair and reasonable, a finding that the intervenors have not appealed. The independent guardian ad litem also found that class counsel had no conflicts and that the Global Settlement Agreement was fair and reasonable and was the best alternative available. The district court did not abuse its discretion in finding that the class was adequately represented and that subclasses were not required.

B. CERTIFICATION UNDER 23(B)(1)(B)

We turn next to the intervenors' challenge to class certification under 23(b)(1)(B).

Rule 23(b) states that where the prerequisites of 23(a) are met, a class action may be maintained if

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> . . .
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications

> or substantially impair or impede their ability to protect their interests.

Fed.R.Civ.P. 23(b).

The district court found that the prosecution of separate actions by members of the Global Health Claimant Class would substantially impair or impede the ability of other members of the class to receive full payment for their injuries from Fibreboard's limited assets. This finding has strong support in the record and is not clearly erroneous. The district court heard expert testimony on the probable number, mix and timing of future asbestos personal injury claims against Fibreboard, the anticipated costs of defense relating to such claims, and the present value of Fibreboard's non-insurance assets. The experts agreed that Fibreboard faced enormous liability and defense costs that would likely equal or exceed the amount of damages paid out. More importantly, these experts testified that even under the Trilateral Settlement Agreement where Fibreboard is given $2 billion in insurance money to add to its own value of approximately $235 million, Fibreboard would be unable to pay all the valid claims against it within five to nine years. The district court credited the testimony of these experts and found that Fibreboard is a limited fund.

1. Rule 23(b)(1)(B) and the Bankruptcy Code

The intervenors argue that if the reason Fibreboard is a limited fund is because it will become insolvent before it pays all claims, then the Global Settlement Agreement is an impermissible attempt to circumvent bankruptcy proceedings and bankruptcy's absolute priority rule.[13] This argument fails to consider (1) decisions of other courts which have certified 23(b)(1)(B)

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13 The absolute priority rule requires that more senior creditors (such as tort creditors) be paid in full before junior claimants (such as shareholders) receive any distribution from an insolvent company.

classes because the claims of the class would bankrupt the defendant, (2) the significance of Fibreboard's settlement with its insurers in driving the Global Settlement Agreement, (3) the plain meaning of Rule 23, and (4) the nonexclusivity of the Bankruptcy Code and its inferiority to a 23(b)(1)(B) class action in the instant case.

Other courts have uniformly found that, in appropriate and limited circumstances, potential or probable insolvency of a defendant can create a limited fund appropriate for adjudication under Rule 23(b)(1)(B). The Second Circuit, in *In re Joint Eastern and Southern District Asbestos Litigation (Findley)*, upheld the district court's conclusion that the likely insolvency of the Manville Trust rendered it a limited fund and qualified it for treatment under Rule 23(b)(1)(B). 982 F.2d 721, 739 (2d Cir. 1992) (cited with approval in *In re Joint Eastern and Southern District Asbestos Litigation (Findley)*, 78 F.3d 764, 777-79 (2d Cir. 1996)). In *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), the Second Circuit approved a 23(b)(1)(B) class action on the ground that individual litigation would reduce the recovery for all plaintiffs from Drexel's limited assets. *Id.* at 292. See also, *In re Joint Eastern and Southern District Asbestos Litigation (Eagle-Picher Industries)*, 134 F.R.D. 32, 34 (E. & S.D.N.Y. 1990); *Coburn* v. *4-R Corporation*, 77 F.R.D. 43 (E.D. Ky. 1977).

In fact, even courts that have refused to certify 23(b)(1)(B) classes have done so on the ground that the parties seeking class certification have failed to present sufficient evidence that the assets of the defendant are insufficient to pay the claims against it. See *In re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988); *In re School Asbestos Litigation*, 789 F.2d 996, 999 (3d Cir. 1986); *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 305-06 (6th Cir. 1984); *In re Northern District of California Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 852 (9th Cir. 1982); *Green* v. *Occidental Petroleum Co.*, 541 F.2d 1335, 1340 n.9 (9th Cir. 1976); *In re "Agent*

Orange" Product Liability Litigation, 100 F.R.D. 718 (E.D. N.Y. 1983); *Payton* v. *Abbott Labs*, 83 F.R.D. 382, 389 (D. Mass. 1979).

In support of their claim that any 23(b)(1)(B) limited-fund action based on a defendant's insolvency is an improper circumvention of the Bankruptcy Code, the intervenors can rely only on dicta from *In re Joint Eastern and Southern District Asbestos Litigation (Keene)*, 14 F.3d 726 (2d Cir. 1993).[14] The intervenors' conclusion is contrary to the overwhelming majority of court decisions on this issue, ignores crucial facts in both *Ahearn* and *Keene* and reads *Keene* in a way that creates an intra-circuit split in the Second Circuit.

Ahearn's Global Settlement Agreement was undisputedly driven by insurance coverage litigation between Fibreboard and its insurers which created a serious risk for all parties to the agreement. The Global Health Claimant Class and Fibreboard faced the real possibility that Fibreboard would be insolvent simply on the basis of claims already settled. The Insurers, on the other hand, faced the possibility of virtually unlimited liability for damage caused by Fibreboard asbestos. This pressure, felt by all parties to the global settlement, is what finally brought them together on the eve of the coverage case appeal. The unique risks posed by the coverage cases distinguish *Ahearn* from a blatant attempt to circumvent the Bankruptcy Code such as occurred in *Keene*.

The facts of *Keene* further distinguish it from our case. First, an already weak Keene attempted to avoid impending bankruptcy by asking the court to coerce its tort victims to settle claims in a court where no claims

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14 Notwithstanding the *Keene* court's gratuitous discussion of its concerns about use of a class action to circumvent bankruptcy laws, the court's holding is that the case was properly dismissed because the plaintiff-manufacturer had no cognizable claim against the defendant class members. *Keene*, 14 F.3d at 733.

were filed against Keene. Second, Keene attempted to utilize the 23(b)(1)(B) injunction to halt pending actions in other courts. Third, and most importantly, Keene's complaint was dismissed on the ground that it failed to present the court with any case or controversy because it requested only that the court compel all plaintiffs in suits against Keene to appear and negotiate.

Ahearn by comparison, presents us with claims against a healthy company for personal injuries and a proposed settlement of those claims. *Ahearn* presents no danger that Fibreboard may simply be abusing this proceeding to delay other actions or to improve its negotiating position with present claimants because it only enjoins future proceedings, not those already pending. We agree with the *Keene* court that under the facts presented to it, a 23(b)(1)(B) action was not appropriate. We also agree that, in the vast majority of cases, the Bankruptcy Code should govern the distribution of an insolvent entity's assets. However, where concerns such as the risk of an adverse judgment in the coverage litigation support an early resolution of the claims against an entity and all parties can benefit from a settlement under Rule 23(b)(1)(B), we see no legal or policy reason to deny the parties this benefit. The essential basis of any settlement is to avoid the uncertainty, risks, and expense of ongoing litigation. In our case, the risks facing Fibreboard, the Insurers, and the health claimants as a result of the California coverage litigation were real and enormous. Holding that the bankruptcy laws require the parties to wait until catastrophe befalls one or more of them as a result of the California litigation would be a denial of justice to the parties before us and unwarranted by the law.

The intervenors' argument that all 23(b)(1)(B) limited-fund actions based on the insolvency of the defendant are improper ignores the special circumstances presented by *Ahearn* and certifications by other courts. In light of the *Findley* and *Drexel* decisions, also from the

Second Circuit, which allow 23(b)(1)(B) actions where the defendant's insolvency creates a limited fund, we decline to read *Keene* so broadly as to bar all such 23(b)(1)(B) settlements.

The plain meaning of Rule 23 also supports a finding that the insolvency of a defendant can support a 23(b)(1)(B) class action. The rule clearly does not distinguish between limited funds which assume insolvency of the defendant and limited funds such as proceeds of an insurance policy which constitute the entire fund from which plaintiffs may recover. It allows class actions whenever "the prosecution of separate actions by or against individual members of the class would create a risk of . . . (B) adjudications with respect to individual members of the class which would as a practical matter . . . substantially impair or impede their ability to protect their interests." Fed.R.Civ.P. 23(b)(1). Insolvency of the defendant undoubtedly impairs the ability of latecomers to receive full payment for their claims and was explicitly considered by the Advisory Committee in proposing the rule in its current form. In its Note to the 1966 Amendment to Rule 23, the Advisory Committee concludes that a limited-fund class action is appropriate in actions by creditors "when the debtor's assets are insufficient to pay all creditors' claims." Fed.R.Civ.P. advisory committee's note. This explicit reference to use of a 23(b)(1)(B) action when the debtor is insolvent offers further support for the proposition that insolvency is an appropriate basis for a limited-fund class action.

Further, the express language of the Rule compels a flexible construction. Rule 23(b)(1)(B) authorizes class certification where there is a "risk" that separate adjudications "as a practical matter" would "substantially impair or impede" the interests of the class. The rule does not require proof to a certainty that the defendant faces insolvency.

The Bankruptcy Code allows courts to dismiss or suspend bankruptcy proceedings where superior alternatives to the code are available. See 11 U.S.C. § 305(a)(1). This concession to the possibility of other proceedings to distribute an insolvent debtor's assets reveals that Congress understood that, at least some of the time, the terms and principles of the Bankruptcy Code would be circumvented by debtors and creditors who found superior methods of asset distribution. See also H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 325 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 35 (1978), U.S. Code Cong. & Admin.News 1978, pp. 5787, 6281.

Ahearn presented the district court with a superior alternative to the Bankruptcy Code and did so long before any bankruptcy court would have had jurisdiction over Fibreboard's assets. Indeed, one of the most important facts of this case is that, in spite of the threat posed by future personal injury litigation, Fibreboard is currently solvent and healthy. In the short term, no trade or tort creditor has the ability or the incentive to force Fibreboard into a Chapter 11 reorganization. It is also clear that shareholders and management, who stand to lose equity and/or employment if Fibreboard enters bankruptcy proceedings, will refuse to file a voluntary petition at least until the coverage dispute is resolved against it. That, of course, would be too late for the Global Health Claimant Class.

Even in the unlikely event that Fibreboard could be persuaded to file a voluntary bankruptcy petition, the Global Health Claimant Class would be worse off than it is under the Global Settlement Agreement. Under the Bankruptcy Code, representation for the class may not be available at all and courts that have allowed representation of future tort claimants have left them in an uncertain position that falls short of full "creditor" status.[15] Additionally, full-blown bankruptcy proceedings

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15 See *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985); *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984); *In re*

(concluded on page A-108)

would bring in all of Fibreboard's other creditors and impose large transactions costs on Fibreboard that, ultimately, would come out of any distribution. See Edward I. Altman, *A Further Empirical Investigation of the Bankruptcy Cost Question*, 39 J.Fin. 1067, 1077 (1984). In stark contrast to the uncertain and weak position afforded future tort claimants under the Bankruptcy Code, the plaintiff class and its representatives in *Ahearn* had center stage and ran no risk of encountering a cram-down reorganization approved only by trade creditors and rammed through over the objections of class representatives.

To the extent intervenors are arguing that certification is improper because Fibreboard fares better under the class action settlement than under a bankruptcy proceeding, we find their focus misplaced. The inquiry instead should be whether the class is better served by avoiding impairment of their interests. Fibreboard is clearly acting in its own interest in consummating the Global Settlement Agreement and thereby avoiding future insolvency. But the Global Settlement Agreement also serves the interests of the Global Health Claimant Class. Early settlement allows the class to recover far more as a group than it could if it was forced to wait until Fibreboard enters bankruptcy on its own and encounters the high transaction costs of insolvency. See Mark J. Roe, *Bankruptcy and Mass Tort*, 84 Colum. L.Rev. 8846, 851-64, 905-17 (1984) (advocating early reorganiza-

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(*continued from page A-107*)

UNR Indus., 29 B.R. 741, 745 n.4 (Bankr. N.D. Ill. 1983). The inability or refusal of the bankruptcy courts to place Global Health Claimant Class members on equal footing with other creditors of Fibreboard and the indeterminance of the "party in interest" categorization that the class would receive if its claims were cognizable at all in bankruptcy have been widely criticized. See e.g. Anne Hardiman, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 Vand. L.Rev. 1369, 1395-96 (October 1985); Kevin H. Hudson, *Catch-23(b)(1)(B): The Dilemma of Using the Mandatory Class Action to Resolve the Problem of the Mass Tort Case*, 40 Emory L.J. 665, 693-95 (Spring 1991).

tions because they avoid the waste of insolvency and distribute more to victims, but noting that no one with the ability to push the mass tortfeasor into an early reorganization has the incentive to do so). Precisely because it avoids the enormous transactions costs of litigation and insolvency, the Global Settlement Agreement can offer a deal from which all parties gain. Members of the Global Health Claimant Class receive more money in payment for their injuries and Fibreboard's shareholders keep their stake in a viable entity. The only loser under the Global Settlement Agreement is the asbestos litigation industry.

For all of these reasons, we find that the district court's decision to certify *Ahearn* as a 23(b)(1)(B) class action is an appropriate interpretation of Rule 23 that does not conflict with the Bankruptcy Code and upholds the principles of equity and fairness.

2. Jurisdictional and due process considerations in 23(b)(1)(b) class actions

The intervenors next argue that the district court cannot exercise jurisdiction over class members who do not have minimum contacts with the Eastern District of Texas and that due process requires that Global Health Claimant Class members be allowed to opt out of the class. Both of these arguments are based on language from the Supreme Court decision *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). In *Shutts*, the Supreme Court held that a Kansas state court could bind absent plaintiff members of the class in a "common question" class action brought under a state rule virtually identical to 23(b)(3) only if the plaintiffs were provided with "minimal procedural due process protection," including the right to opt out. *Id.* at 811-12, 105 S.Ct. at 2974. However, the Court specifically limited its holding to

> class actions which seek to bind *known* plaintiffs concerning claims *wholly or predominantly for money judgments*. We intimate no view concern-

> ing other types of class actions such as those seeking equitable relief.

Id. at 811 n. 3, 105 S.Ct. at 2974 n. 3 (emphasis added).

The limitation of *Shutts* to claims of known plaintiffs that are predominantly for money damages forecloses application of its holding to 23(b)(1)(B) actions which have always been equitable and often involve unknown plaintiffs. See Newberg & Conte, *1 Newberg on Class Actions* § 1.18.

Class actions date back to the English common law where chancery courts used bills of peace to bind entire classes. Chafee, *Bills of Peace with Multiple Parties*, 45 Harv. L.Rev. 1297 (1932). The traditional limited-fund class action is an equitable and unitary disposition of a fund too small to satisfy all claims. See Fed.R.Civ.P. 23 advisory committee's note. Unitary adjudication of a limited fund is crucial because allowing plaintiffs to sue individually would make the litigation "an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest." *Coburn* v. *4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977). Limited-fund class actions effect a pro-rata reduction of all claims in order to treat all claimants fairly. Thus, they sound in equity even though the relief they provide necessarily affects the amount of money damages that claimants can ultimately receive. *In re Joint Eastern & Southern Dist. Asbestos Litigation (Findley)*, 78 F.3d 764, 776-77 (2d Cir. 1996); Newberg and Conte, *1 Newberg on Class Actions* § 1.18.

Due process standards for suits seeking equitable relief are set forth in *Hansberry* v. *Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940) where the Supreme Court stated:

> this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the

> interests of absent parties who are to be bound by it.

Id. at 42, 61 S.Ct. at 118. See also *Shutts*, 472 U.S. at 808, 105 S.Ct. at 2972-73 (citing Hansberry in its description of due process requirements for traditional class actions). The rule that adequate representation is all that due process requires for the traditional mandatory class action in equity was not challenged by *Shutts*. Subsequent decisions have made it clear that, consistent with due process, absent parties can be bound by a judgment where they were adequately represented in a prior action. *Martin* v. *Wilks*, 490 U.S. 755, 762 n. 2, 109 S.Ct. 2180, 2184 n. 2, 104 L.Ed.2d 835 (citing *Hansberry* and Fed.R.Civ.P. 23).

Actions under Rule 23(b)(1)(B) are precisely the type of limited circumstances noted by *Martin* where "equitable circumstances dictate the need for a unitary adjudication regardless of the individual consent of the parties affected." Newberg and Conte, *1 Newberg on Class Actions* § 1.22 at 1-51. As a result, due process requires only that all parties bound by the Global Settlement Agreement were adequately represented. We have already concluded that they were.[16]

The intervenors object that some members of the class may not have minimum contacts with the Eastern District of Texas and have not otherwise consented to the district court's jurisdiction. They also claim that the

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16 **Opt-out class actions were unheard of before the 1966 amendments to the Federal Rules of Civil Procedure created the Rule 23(b)(3) opt-out class action. The intervenors would have us read *Shutts* to mean that all class actions involving money claims under Rule 23(b)(1) or (2) are unconstitutional. If the Supreme Court had intended to so hold, it surely would have been more explicit given the ancient history of the mandatory class action, over a hundred years of precedent upholding the constitutionality of such classes, the relatively recent development of the "opt-out" class action, and the strong presumption that the Federal Rules of Civil Procedure are constitutional.**

Global Settlement Agreement is without authority to release future claims that have not yet accrued. These objections again ignore the equitable nature of this action.

Due process requires adequate representation in a 23(b)(1)(B) case but, as *Shutts* expressly cautioned, minimum contacts or consent to jurisdiction are not necessary in equitable class actions. Newberg and Conte, *1 Newberg on Class Actions*, § 1.20 ("Minimum Contacts Jurisdiction Not Required for Members of Equitable Class Suits") and § 1.21 ("Opt-Out Rights or Implied Consent of Members Not Required for Jurisdictional Due Process in Equitable Class Suits"). It is also well settled that a unitary adjudication of a limited fund binds future, contingent, and unknown claimants who, by definition, could not give consent to jurisdiction. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Rule 23(b)(1)(B) actions closely resemble actions for interpleader, or for the accounting of a trustee. See *Mullane*, 339 U.S. at 311-13, 70 S.Ct. at 655-57; *In re Joint Eastern and Southern Dist. Asbestos Litigation (Findley)*, 878 F.Supp. 473, 478, 562 (E. & S.D.N.Y. 1995); *In re Joint Eastern and Southern Dist. Asbestos Litigation (Eagle-Picher)*, 134 F.R.D. 32, 38 (E. & S.D.N.Y. 1990). Cf. *In re Federal Skywalk Cases*, 680 F.2d 1175, 1182-83 (8th Cir. 1982). This is because all claimants will recover from the fund or not at all. This view of a limited-fund class action as similar to an action in rem makes particular sense because, although limited-fund actions often involve unknown or unavailable claimants who cannot expressly consent to jurisdiction, the court in such an action has before it for disposition all the assets in which class members could claim an interest. See e.g., *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992); *In re Joint Eastern and Southern Dist. Asbestos Litigation (Eagle-Picher)*, 134 F.R.D. 32, 38 (E. & S.D.N.Y. 1990); *Coburn* v. *4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977).

The court can appropriately adjudicate all claims against the fund because of its jurisdiction over the fund and the fact that all potential claimants are adequately represented before it. *Smith* v. *Swormstedt*, 57 U.S. (16 Howard) 288, 302, 14 L.Ed. 942 (1853).

Finally, the intervenors complain that the Global Settlement Agreement purports to release claims which do not present "a case or controversy." This misconstrues the nature of the settlement which does not purport to make any determination of the validity or amount of individual personal injury claims against Fibreboard. What the settlement does is address the immediate and important controversy of whether future claimants will be able to receive compensation for their injuries before Fibreboard runs out of money. It resolves this controversy by settling the insurance coverage litigation, capping the amount recovered by individual plaintiffs at $500,000, prohibiting punitive damage awards, and limiting the amount that the Global Trust can pay out in any given year. These provisions are designed to ensure that latecomers do not find their claims impaired because the winners of the race to the courthouse have claimed all of Fibreboard's assets in the early rounds of individual litigation. The argument that plaintiffs who have already been exposed to asbestos have no justiciable interest in ensuring that funds remain available to compensate them when they contract asbestos-related diseases is not supportable and has been widely rejected. See *In re Johns-Manville Corp.*, 36 B.R. 743, 749 (Bankr. S.D.N.Y. 1984); *Carlough* v. *Amchem Products, Inc.*, 10 F.3d 189, 196 n.4 (3d Cir. 1993). The intervenors' objection is meritless.

The district court properly found that Fibreboard is a limited fund which will be depleted to the detriment of latecomers if claims are litigated on an individual basis. Due process requires that class members in *Ahearn*, an equitable class action for a pro-rata distribution of a limited fund, receive adequate representation by class

representatives with similar interests. The district court did not abuse its discretion in finding that these requirements were met and certifying this suit as a Rule 23(b)(1)(B) class action.

C. OTHER OBJECTIONS

1. "Friendly" suit

The intervenors assert that *Ahearn* was a collusive or "friendly" suit in contravention of the "case or controversy" requirement of Article III in the Constitution. Specifically, the intervenors allege that (1) there was no real conflict between the parties because the complaint and settlement were filed the same day and class representatives never intended to litigate the claims alleged in the complaint, and (2) the defendants handpicked the plaintiffs' attorneys. These arguments fail because they conflict with relevant caselaw and do not address the district court's findings of fact regarding the non-collusive nature of the settlement negotiations. The intervenors also ignore the adversarial positions which the parties occupied before settlement negotiations and the positions to which they will return if the settlement is not approved.

A "case or controversy" under Article III requires that the parties be truly adverse. *United States* v. *Johnson*, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943). This requires a continuing controversy, *Preiser* v. *Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975), and an "honest and actual antagonistic assertion of rights." *Johnson*, 319 U.S. at 305, 63 S.Ct. at 1076 (quoting *Chicago & Grand Trunk Ry. Co.* v. *Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 402, 36 L.Ed. 176 (1892)).

The parties in *Ahearn* filed their proposed settlement agreement on the same day as the plaintiff class filed its complaint so they clearly did not intend to litigate the complaint. However, this does not change the adversarial nature of the disputes which the settlement

resolves and does not contradict the district court's finding that settlement negotiations were heated, difficult and conducted at arm's length. The intervenors are apparently asking us to hold that the suit is either moot or collusive simply because it was filed at the same time as a settlement requiring court approval. Neither of these conclusions is supportable.

The Supreme Court has stated that the existence of a proposed settlement does not render an action moot where judicial approval of the settlement is required before the settlement will bind the parties. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 371 n.10, 102 S.Ct. 1114, 1120 n.10, 71 L.Ed.2d 214 (1982). *Ahearn* was a class action that could not be settled without court approval so the parties' agreement to settle the case did not make it moot.

The other finding suggested by the intervenors, that the suit is collusive simply because the parties have resolved their differences and seek only the judicial approval required by Rule 23(e), is equally unsupportable and has also been rejected. See *Carlough* v. *Amchem Products*, 10 F.3d 189, 201 (3d Cir. 1993) (adopting the reasoning of the district court's October 6, 1993 opinion in *Carlough* v. *Amchem Products, Inc.*, 834 F.Supp. 1437, 1465 (E.D. Penn. 1993)); *In re Joint Eastern and Southern District Asbestos Litigation (Findley)*, 982 F.2d 721, 728 (2d Cir. 1992) (complaint and settlement filed the same day); *S.E.C.* v. *Randolph*, 736 F.2d 525 (9th Cir. 1984) (controversy exists even though settlement and complaint were filed the same day).

The district court found that the *Ahearn* complaint and proposed settlement were not collusive. The intervenors' assertions to the contrary have no support in the record. The district court found that the negotiation process was slow, contentious and fraught with disagreements on serious issues. Its exhaustive findings of fact detail the parties' initial positions and their slow

movement toward a settlement that offers a fair compromise of their various claims.

The complaint that Fibreboard handpicked the plaintiffs' attorneys is equally without merit and tells only part of the story. The record shows that Fibreboard did approach the attorneys to negotiate a global settlement but the intervenors fail to include important details such as (1) the plaintiffs' lawyers involved in the negotiations have extensive experience in asbestos litigation, and (2) the district court found that the plaintiffs' lawyers vigorously represented their clients' position. We have already concluded that the Global Health Claimant Class was adequately represented by qualified attorneys. The fact that Fibreboard initiated negotiations with a group of highly experienced, top-notch plaintiffs' attorneys in order to craft a global settlement suggests that Fibreboard wanted a fair settlement that a court was likely to approve.

2. Recusal of Judge Parker

The Flanagan intervenors appeal from Judge Steger's order in the district court denying their motion to recuse Judge Parker. They argue that Judge Parker should not have mediated the settlement and then conducted a fairness hearing on the same settlement. We review Judge Steger's decision for abuse of discretion. *In re Hipp*, 5 F.3d 109, 116 (5th Cir. 1993).

A judge must disqualify himself under § 455 if his impartiality "might reasonably be questioned." 28 U.S.C. § 455. The standard for determining impartiality depends on the source of the judge's alleged prejudice. To the extent that a judge has become biased due to facts he has learned during a judicial proceeding, he must recuse himself only if fair judgment would be impossible. *Liteky* v. *United States*, 510 U.S. 540, ___, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994). If the alleged partiality stems from a source other than a judicial proceeding, a judge must recuse himself if "a reasonable

and objective person, knowing all of the facts, would harbor doubts concerning the judge's partiality." *United States* v. *Jordan*, 49 F.3d 152, 155 (5th Cir. 1995).

Judge Parker's role in the negotiating process was insubstantial and stemmed from three cases filed in his court. His actions were limited to appointing Judge Patrick E. Higginbotham of this court as a settlement facilitator, appointing class counsel for the Global Health Claimant Class at the recommendation of Judge Higginbotham, receiving regular reports of the negotiations and mediating the global settlement negotiations personally for part of one evening. After the parties agreed to a settlement, Judge Parker held an extensive fairness hearing and appointed an independent guardian ad litem to report on the fairness of the settlement to the futures class.

Judge Steger found that "[o]n the basis of the entire record and taking all of Mr. Jaques' allegations as true, . . . no reasonable person would conclude that Judge Parker is biased and no reasonable person would harbor doubts about his impartiality."[17] Our review of the record confirms that Judge Parker carefully avoided any appearance of impropriety. The district court did not abuse its discretion in denying the motion to recuse.

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17 The district court also rejected the intervenors' motion under 28 U.S.C. § 144. This statute requires that a party submit an affidavit alleging facts that, if true, would convince a reasonable person that bias exists. However, "[a] court may not grant relief under § 144 if a party's counsel instead of the party executes an affidavit alleging personal bias or prejudice." *Pomeroy* v. *Merritt Plaza Nursing Home, Inc.*, 760 F.2d 654, 658-59 (5th Cir. 1985) (citations omitted). The only affidavit before the district court was submitted by counsel for the Flanagan intervenors, Leonard Jacques, and therefore did not qualify for relief under § 144. The district court's error in considering the recusal motion under § 144 was harmless in any event because the court properly concluded that even if the facts in the affidavit were assumed true, a reasonable person would find that no bias exists.

3. Plant Insulation Company

Plant Insulation Company, a member of the Global Third-Party Claimant Class, argues that its due process rights were violated because it was not allowed to opt out of that class. Plant did not attempt to intervene in the proceeding before the district court so it has no standing to appeal the district court's ruling. The Fifth Circuit has held that "non-named class members do not have standing to appeal the final judgment in a class action . . . ." *Walker* v. *City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir. 1988). As a result, "we have no jurisdiction to consider an appeal by a class member who has not attempted to intervene as a named party." *Loran* v. *Furr's/Bishop's Inc.*, 988 F.2d 554 (5th Cir. 1993). See also, *Edwards* v. *City of Houston*, 78 F.3d 983 (5th Cir. 1996) (en banc) (unions had no standing to appeal the court's final judgment because they never became named parties or intervenors in the suit). Accordingly we dismiss Plant's appeal for lack of standing.[18]

4. Other objections of the *Flanagan* intervenors

The Flanagan intervenors raise several more objections common to *Ahearn* and *Rudd*. They argue that merchant mariners are differently situated from other members of the Global Health Claimant Class because of differences between admiralty law and the tort law of

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18 Two other would-be appellants also lack standing under this rule. However, we need not dismiss their appeals for lack of standing because they are dismissed on other grounds.

On March 25, 1996, Jeffrey Mack Chapin filed notices of appeal complaining of orders entered in *Ahearn* and *Rudd*. These notices of appeal which were consolidated into *Ahearn* and *Rudd* were untimely and are therefore dismissed.

Kenneth Smith has also filed notices of appeal complaining of the orders in *Ahearn* and *Rudd*. Smith's notices of appeal have also been consolidated into *Ahearn* and *Rudd* and are dismissed due to Smith's failure to pay the docketing fee and failure to file an appellate brief.

some states. This argument ignores the fact that the Global Settlement Agreement allows claimants the same rights they would receive in the tort system (limiting only the amount of total damages and punitive damages). Admiralty law will provide the backdrop for any maritime plaintiff's settlement because that law will govern the trials of maritime plaintiffs who choose the back-end opt-out provision.

Finally, the *Flanagan* intervenors claim that the district court improperly used defendant classes. They argue that defendant classes are only appropriate in cases where defendants are guilty of egregious misconduct. This argument has no support in the language of Rule 23 and is contrary to a wide range of cases where courts have certified defendant classes without requiring a "widespread pattern of wrongful conduct." See e.g., *Blake* v. *Arnett*, 663 F.2d 906, 911-13 (9th Cir. 1981) (defendant class of Yurok Indians on counterclaims seeking declaration eliminating alleged Indian treaty rights in land held by lumber and mining company); *Board of Regents of University of Nebraska* v. *Dawes*, 522 F.2d 380, 381 (8th Cir. 1975) *cert. denied*, 424 U.S. 914, 96 S.Ct. 1112, 47 L.Ed.2d 318 (1976) (defendant class of employees allegedly discriminated against by plaintiffs); *Garneau* v. *City of Seattle*, 897 F.Supp. 1318, 1320 (W.D. Wa. 1995) (defendant class of low-income tenants seeking relocation assistance from plaintiffs); *Houston Chapter of the Int'l Ass'n of Black Professional Firefighters* v. *Houston*, 1991 WL 340296, at *3, *28 (S.D. Tex. May 3, 1991) (defendant class of present and future non-black, non-Hispanic firefighters who will be eligible for certain ranks in the Houston Fire Department).[19]

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19 The *Flanagan* intervenors also argue that claims which Fibreboard already knew about (those of Mr. Jaques' clients) cannot be

(*concluded on page A-120*)

III.
RUDD

In addition to the claims addressed above, the *Flanagan* intervenors make several objections specific only to *Rudd*.[20]

A. FIBREBOARD AS AN INDISPENSABLE PARTY

The *Flanagan* intervenors argue that the *Rudd* action must be dismissed for lack of an indispensable party, Fibreboard.[21] Although they failed to raise this issue in

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(*continued from page A-119*)

"future claims" simply because they were not filed before the settlement was reached. This objection is asserted without any basis in law and fails to explain how claims which have not yet been filed could be anything other than "future claims" in the eyes of a court.

The *Flanagan* intervenors also claim that they are appealing the judgment entered in *Ahearn* which approves the Trilateral Settlement Agreement as a fair settlement of the coverage litigation between Fibreboard and the Insurers. However, Flanagan failed to raise this issue in his initial brief and has not demonstrated that he has standing to challenge this judgment. On appeal, this court will not reach issues not raised in the initial brief. *United Paperworkers Intern. U.* v. *Champion Intern.*, 908 F.2d 1252, 1255 (5th Cir. 1990). Additionally, Flanagan has failed to demonstrate (or make any argument) that he is a proper party to appeal the judgment approving the fairness of the settlement of the coverage litigation between Fibreboard and the Insurers. See *Rohm & Hass Tex.* v. *Ortiz Bros. Insulation*, 32 F.3d 205 (5th Cir. 1994).

20 The *Flanagan* intervenors argue that *Rudd* was inappropriately certified as a 23(b)(1)(B) class. We do not consider the merits of this argument because the district court found, and we agree, that the defendant class in *Rudd* could also be certified under 23(b)(2). None of the intervenors appeals the propriety of certification under this provision.

21 Rule 19(b) requires a district court deciding the question of indispensability to consider:

(*concluded on page A-121*)

the district court, we may still consider it on appeal. *United States* v. *Sabine Shell, Inc.*, 674 F.2d 480, 482 (5th Cir. 1982). However, "failure to raise the issue of joinder until this appeal mitigates against a finding in their favor." *Id.* at 483. We agree with the Ninth Circuit that "when the judgment appealed from does not in a practical sense prejudicially affect the interests of the absent parties, and those who are parties have failed to object to non-joinder in the trial court, the reviewing court will not dismiss an otherwise valid judgment." *Sierra Club* v. *Hathaway*, 579 F.2d 1162, 1166 (9th Cir. 1978), cited with approval in *McCulloch* v. *Glasgow*, 620 F.2d 47, 51 (5th Cir. 1980). See also *Judwin Properties Inc.* v. *United States Fire Insurance Co.*, 973 F.2d 432, 434 (5th Cir. 1992) and *Sabine Shell*, 674 F.2d at 483.

Both the Trilateral Health Claimant Class and the Trilateral Third-Party Claimant Class agreed to a consent judgment sought by the Insurers declaring approval of the Trilateral Settlement Agreement and the release of the Insurers. Because Fibreboard has already consented to entry of a similar release of the Insurers in *Ahearn*, the *Rudd* judgment does not prejudicially affect Fibreboard. Thus, *Rudd* should not be dismissed for want of an indispensable party.

(*continued from page A-120*)

> **first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.**

Fed.Rule Civ.Proc. 19(b).

B. JUSTICIABILITY OF THE RUDD CLAIM

The *Flanagan* intervenors argue that the *Rudd* complaint fails to state a cause of action or a "case or controversy." The Insurers in *Rudd* seek declaratory and injunctive relief determining that (1) the Trilateral Settlement Agreement is fair, reasonable, and negotiated at arm's length in good faith; (2) the defendant classes approve of the Trilateral Settlement Agreement and the release of the Insurers; and (3) the defendant classes be enjoined from asserting future claims against the Insurers.

The Declaratory Judgment Act does not expand the jurisdiction of the federal courts. See *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-72, 70 S.Ct. 876, 878-79, 94 L.Ed. 1194 (1950). Similarly, it does not create substantive rights; it is only a procedural device that enhances the remedies available in the adjudication of a case or controversy. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 463-64, 81 L.Ed. 617 (1937).

A justiciable case or controversy exists as long as the court's ruling will affect "tangible legal rights." *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 619, 109 S.Ct. 2037, 2046-47, 104 L.Ed.2d 696 (1989). In *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941), the Supreme Court stated that "[b]asically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 273, 61 S.Ct. at 512.

In *Rudd*, the Insurers seek a declaratory judgment that because the Trilateral Settlement Agreement is fair and negotiated in good faith, it cuts off all rights of both Trilateral Health Claimants and Trilateral Third-party Claimants to payments under the policies. The Insurers were justifiably concerned that after they

spend $2 billion on the Trilateral Settlement with Fibreboard, the settlement could be challenged by asbestos victims and third-party claimants, particularly if Fibreboard becomes insolvent. The Insurers in *Rudd* sought to cut off this potential challenge by obtaining the declaratory and injunctive relief described above.

Many states recognize that a tort victim injured during the policy period has sufficient legal interest in that policy to attack subsequent changes that affect the right to recover — i.e., reformation, cancellation, or settlement of the policy. See, e.g., *Maryland Casualty Co.*, 312 U.S. at 273-74, 61 S.Ct. at 512-13 (a tort victim has a potential financial interest in the insurer's insurance policy, and the impairment of this interest is an injury that will support standing under Article III); *Bankers Trust Co.* v. *Old Republic Insurance Co.*, 959 F.2d 677, 682 (7th Cir. 1992) ("the victim of an insured's tort, even though he is not a third-party beneficiary of his insurer's insurance policy, has a legally protected interest in that policy before he has reduced his tort claim to judgment"). Some states even require the injured party to be included in any negotiations of policy changes that will affect their rights. See e.g., *Smith & Wesson* v. *Birmingham Fire Ins. Co.*, 123 A.D.2d 135, 510 N.Y.S.2d 606, 608 (1st Dept. 1987); *Maryland Cas. Co.* v. *Wilson*, 6 Ariz.App. 470, 433 P.2d 650, 652 (1967); *Shapiro* v. *Republic Indem. Co.*, 52 Cal.2d 437, 341 P.2d 289, 290 (1959); *Womack* v. *Allstate Ins. Co.*, 156 Tex. 467, 296 S.W.2d 233, 236 (1956). Thus, the Insurers faced a substantial threat of collateral attacks from members of both the Trilateral Health Claimant Class and the Trilateral Third-party Claimant Class asserting that the Trilateral Settlement was unfair or fraudulent. A true controversy existed.

The *Flanagan* intervenors also argue that the Trilateral Settlement Agreement is effective only if the *Ahearn* settlement is rejected. Flanagan argues that this contingency precludes a finding that *Rudd* is an adjudication

of a "present right upon established facts." *Brown & Root, Inc.* v. *Big Rock Corp.*, 383 F.2d 662, 665 (5th Cir. 1967).

The Trilateral Settlement Agreement contains provisions that become operative regardless of whether the Global Settlement Agreement is ultimately approved or disapproved; for example, the parties agree in the Trilateral Settlement Agreement to compromise all Fibreboard's claims under the insurance policies not previously released, including claims for property damages. The Global Settlement Agreement only refers to personal injury claims filed against Fibreboard after August 27, 1993. Therefore, the effectiveness of the Trilateral Settlement Agreement is not wholly contingent on the outcome in *Ahearn*.

Moreover, the case would be ripe even if the effectiveness of the Trilateral Settlement Agreement were wholly contingent upon the disapproval of the Global Settlement Agreement. In *Chevron U.S.A., Inc.* v. *Traillour Oil Co.*, 987 F.2d 1138 (5th Cir. 1993), we found a case would be ripe for adjudication notwithstanding the existence of some contingency to the claim if either (1) there is "a substantial possibility" that the contingency will occur, or (2) the only questions being presented "are purely legal ones." *Id.* at 1154. We found judicial resolution of contingent claims is consistent with the purpose of the Declaratory Judgment Act which is "to settle actual controversies before they ripen into violations of law or breach of some contractual duty." *Id.* (quoting *Hardware Mutual Casualty Co.* v. *Schantz*, 178 F.2d 779, 780 (5th Cir. 1949)).

In *Rudd*, the contingency that the global settlement might not receive court approval or might be successfully attacked was a substantial possibility; the global settlement was an innovative approach to unique circumstances. The parties to *Ahearn* had no assurance that a court would accept this settlement which is the reason the *Ahearn* plaintiffs insisted on a back-up agree-

ment to settle the coverage issue. Thus, we agree with the district court that the *Rudd* complaint presented a justiciable claim.

CONCLUSION

Although appellants' arguments challenging the approval of the global settlement are not insubstantial, on the unique facts presented here they do not carry the day. The global settlement was driven by insurance coverage litigation between Fibreboard and the Insurers which would have been catastrophic for whomever was on the losing side. None of the parties was prepared to take the enormous risk inherent in that litigation. The global settlement offers all sides the best solution possible by eliminating costly disputes between Fibreboard, its insurers, and asbestos claimants and ensuring an equitable distribution to asbestos claimants. The $1.5 billion global settlement was a major accomplishment by all parties concerned and no one seriously challenges its adequacy or the desirability of avoiding another bankruptcy of a vigorous American company.

For the reasons stated above, we conclude that in this case none of the legal impediments argued by appellants precluded the district court from approving the global or trilateral settlements. Both settlements were legally sound resolutions of serious disagreements. The judgment of the district court is

AFFIRMED.

JERRY E. SMITH, Circuit Judge, dissenting:

I.

INTRODUCTION.

The district court and the majority undoubtedly are driven by a commendable desire to resolve voluminous personal injury claims against an otherwise strong American company and to ensure an orderly transfer of

funds from the company's insurers to its victims. In order to accomplish this result, however, they have extinguished claims over which they have no jurisdiction and deprived thousands of asbestos victims of basic constitutional rights. The result is the first no-opt-out, mass-tort, settlement-only, futures-only class action ever attempted or approved.

Ironically, the willingness to jettison centuries-old legal precepts hurts the very victims they intend to help: The settlement forces asbestos victims to surrender their claims in exchange for a meager $10 million of Fibreboard's $225-250 million net worth. They also benefit from Fibreboard's settlement with its insurers, but Fibreboard and the insurers had powerful incentives to settle that dispute by themselves; in fact, they did so for $2 billion.

There was no need even to involve the class in those negotiations, much less to sacrifice its interests. "Thus, the class members appear to have traded Fibreboard's liability for nothing to which they did not already have a right."[1]

On the other hand, the district court and the majority have bailed Fibreboard's shareholders out of a mammoth liability and awarded $43.7 million to class counsel. This suit was supposedly brought on behalf of Fibreboard's victims, but of the four entities directly affected by the settlement — Fibreboard, class attorneys, courts, and asbestos victims — the victims were the only entity absent from the bargaining table. Perhaps for that reason, they also were the only losers.

How could well-intentioned judges sanction — indeed, compel — such an untoward result? Apparently this is simply a case of judges — both trial and appellate — trying too hard to solve the vexing problems posed by

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[1] John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L.REV. 1343, 1420 (1995).

unending asbestos litigation. Having certified at least two other high-profile asbestos class actions,[2] then-Chief District Judge Parker was acutely aware of the problems posed by asbestos litigation. In the end, he appears to have become too close to both the overall problem and the instant settlement to continue to act in a judicial capacity in this case.[3]

When Fibreboard and class counsel announced at a court hearing that they had reached a settlement, Chief Judge Parker referred to "extensive negotiations between counsel that the Court has participated in." Also at that time, and long before the fairness hearing, he said, "We will trust in the scholarship, the good judgment and common sense of the . . . courts of appeal in the event this comes to their attention." In short, Chief Judge Parker tried his best to solve a perplexing problem, and it is our task to figure out whether that solution is legally sustainable.

There are two primary problems: (1) Fibreboard, class counsel, and Fibreboard's other creditors have combined to profit at the expense of absent class members; and (2) this case is an affront to the integrity of the judicial system. As we observed when reversing Chief Judge Parker's certification of another class action against Fibreboard: "The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more." *Fibreboard*, 893 F.2d at 712.

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2 See *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (granting writ of mandamus); *Jenkins* v. *Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986) (affirming certification).

3 For example, certain of the appellants make much of a gathering Chief Judge Parker arranged at his house during which, allegedly, counsel — especially the insurers' — were hounded into settling. I reach no conclusion regarding the details of this episode except that it demonstrates both that the proceedings in this case were unusual and that Chief Judge Parker was aggressively involved in the settlement.

A. IMPORTANCE AND UNIQUENESS.

This case is extraordinarily important. Prior to the filing of this suit, no one had ever attempted a no-opt-out, mass-tort, settlement-only, futures-only class action. Ever since the district court's certification order, however, corporate America has been "anxiously awaiting" a decision in this case. Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST. J., July 18, 1996, at A1. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map for sheltering their assets and improperly restricting the rights of their present and future victims." Amicus Br. of Trial Lawyers for Public Justice at 2-3.

Thus, the majority's reliance upon the "unique facts" of this case, see maj. op. at 993 [A-125]*, is ironic: The unique fact of the insurance dispute is simply irrelevant, and the other unique facts — a corporate defendant's hand-picking class counsel, cutting a side deal, reaching a "global settlement" affecting only "future" plaintiffs, and choosing a sympathetic judge to approve the settlement — likely will become far too common now that the majority has approved of them. "[W]hat was meant to provide a remedy for those who would otherwise lack one, enabling them to pool their voices and finances, will become a device to take away remedies from those who could otherwise invoke them." John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L.REV. 1222, 1223 (1995).

B. THE NEED FOR PROCEDURAL PROTECTIONS.

Two primary errors led the district court and the majority astray. These are, first, underestimating the

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* [*Printer's Note*]: **Reference to the majority opinion's published pagination will be followed by bracketed reference to the pagination of this Appendix.**

importance of jurisdictional and procedural protections for absent class members, and second, departing from the judiciary's exclusive area of authority and competence — the resolution of lawsuits.

We must keep in mind that it was the defendant — Fibreboard — who selected the class that was to "sue" it and the class action lawyers who were to do the dirty work. Fibreboard hand-picked a class that was uniquely vulnerable to exploitation, class counsel who were widely reported to have sold out a similar class, and a court with a reputation for favoring a global settlement. Class counsel then cut a side deal with Fibreboard before agreeing to the class settlement, and the district judge presided at the fairness hearing on the very settlement he had helped to craft.

The settlement extinguishes claims of people over whom we lack jurisdiction, some of whom have not yet been injured and others of whom have not even been born. It also prevents such future claimants from opting out, because of a supposed need to divide a limited fund among a large number of claimants, but it grants automatic opt-outs to all those who already had filed suit. Coincidentally or not, this gerrymandered class definition includes those most vulnerable to abuse while excluding those most likely to intervene, to monitor class counsel, and to oppose the settlement.

It is fair to question for whom class counsel really worked. Fibreboard picked them, the district court approved them, the insurers paid them, and in exchange, they bailed out Fibreboard's shareholders and relieved district courts of potentially thousands of cases — at the expense of the absent asbestos victims whom class counsel purportedly represent.

> If all that was at stake for individual class members was some nominal compensation for having been charged an extra five cents on a bag of potato chips, one might not be too concerned

> with how the courts enforced class counsel's duties to these people. But often much more is at stake, such as whether a plaintiff will recover for a fatal illness caused by a defective product, and if so, how much. Today, such a person may have her rights adjudicated by a court without actual notice of the action and before she even knows she has been injured.
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> Fantastic as this may seem . . . , it is true.[4]

But it need not be. Even rudimentary constitutional protections — such as according absent class members adequate representation and adjudicating only their presently-existing, legally cognizable injuries — would have prevented Fibreboard from perpetuating this unfortunate miscarriage of justice.

C. LEGISLATED TORT REFORM.

The district court legislated a bold and novel tort reform proposal thinly disguised as the settlement of a lawsuit. Of course, there never was a lawsuit: Fibreboard and its hand-picked class counsel agreed to file a suit only if they already had settled it. Thus, Chief Judge Parker began his opinion by stating, "This action was filed to obtain judicial approval of a class settlement." *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505, 507 (E.D. Tex. 1995).

The class complaint alleges exposure-only claims for which the settlement provides no compensation. Class

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4 Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 13 (1995). The *Ahearn* and *Georgine* settlements have received significant attention in the academic literature, most of it extremely negative. See, e.g., Coffee, *supra* note 1, at 1393-1404; Roger C. Crampton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L.REV. 811, 825-35 (1995); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L.REV. 1045 (1995); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L.REV. 858, 898-900 (1995).

counsel even conceded that, as a matter of practice, they do not pursue such claims on behalf of their own clients; instead, they wait and file suit after a plaintiff actually has suffered an injury. The only reason to include those claims in the complaint was to manufacture jurisdiction over class members who have not yet manifested symptoms of asbestosis or otherwise suffered a legally cognizable injury. Even that attempt to trump up jurisdiction should fail, however, as many states do not recognize an exposure-only cause of action.

Moreover, the settlement does not resolve the rights of individual class members. The only genuinely judicial aspect of approving the settlement is the release of Fibreboard from liability to the class, or more specifically, the transfer, from Fibreboard's shareholders to its victims, of the risk that Fibreboard's insurance assets are inadequate.

The remainder of the settlement is purely legislative: Class members' causes of action are repealed in favor of the equivalent of a workers' compensation regime.[5] The Association of Trial Lawyers of America summed up this point nicely in an amicus brief opposing the settlement: "The alchemy of the [instant] settlement . . . had the effect of transforming the common law damage claims of asbestos victims, which were clearly safeguarded by the right to trial by jury, into administrative claims without that right." Amicus br. at 9.

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[5] **The purported "back-end opt-out right" likely will prove to be no right at all. Before he may even file a lawsuit, a victim must (1) file a claim with the trust and wait for it to evaluate his claim; (2) engage in settlement discussions; (3) proceed to mediation; and (4) participate in non-binding arbitration.**

Even after securing a court judgment in his favor, the claimant may not enforce that judgment; instead, he must accept installment payments over a number of years. His recovery is capped at a pre—

(*concluded on page A-132*)

Even if exchanging state tort law for this private, alternative dispute resolution mechanism were the boon to class members that the majority holds it out to be — and I doubt that it is, see *infra* part IX — such a policy decision is "better addressed to the representative branches — Congress and the State Legislature." *Fibreboard*, 893 F.2d at 712. In addition, Fibreboard hardly deserves more than $200 million for drafting the legislation.

"[T]raditional ways of proceeding reflect far more than habit." *Fibreboard*, 893 F.2d at 710. As judges are trained and equipped to adjudicate, not legislate, it is understandable that the courts have fallen prey to powerful special interest groups — a wealthy defendant and the class action bar — and unwittingly disserved the very victims the courts were intended to help.

D. CONSTRUCTIVE BANKRUPTCY.

Nor does Fibreboard's "constructive bankruptcy" justify abridgment of absent class members' substantive state law rights. In bankruptcy, the claims of all of Fibreboard's creditors, not just its "future" personal injury victims, would be crammed-down. Permitting Fibreboard to effect a reorganization bankruptcy proceeding in the guise of a futures-only class action circumvents the detailed protections of the Bankruptcy Code for the express purpose of imposing the entire cost of the bailout on Fibreboard's most vulnerable creditors, to the betterment of its shareholders.

The Second Circuit decertified a similar settlement class for precisely that reason:

(*continued from page A-131*)

set dollar amount, and he is barred from receiving punitive damages or pre- or post-judgment interest. In short, the settlement ensures that the trust can make trial an impracticable method of recovery, forcing class members to settle within the confines of the administrative procedure devised by Fibreboard and class counsel.

> Evasion of bankruptcy is . . . not without costs or other perils . . . . [C]lass members in cases such as this would have no say in the conduct of the court-appointed class representatives and, unlike creditors in bankruptcy, are not able to vote on a settlement. For them, it would be "cram-down" from start to finish.

Keene Corp. v. *Fiorelli (In re Joint E. & S. Dist. Asbestos Litig.)*, 14 F.3d 726, 732 (2d Cir. 1993) (citation omitted). The amicus brief of the Trial Lawyers for Public Justice puts the point more forcefully: "[I]nstead of protecting class members from the risk that their ability to obtain relief from Fibreboard will be 'substantially impaired,' certification of the proposed settlement class here ensures that the class members' ability to obtain relief from Fibreboard will be totally eliminated." Amicus br. at 6.

E. CREATING A CIRCUIT SPLIT.

Our sister circuits have rejected all other actions that came even close to attempting what Fibreboard has done here. The Ninth Circuit has squarely held that opt-out rights are available in all class actions seeking predominantly monetary damages, regardless of the subsection under which they were certified. See *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), cert. dismissed, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994). Two other circuits appear to agree with the Ninth, and none has expressly disagreed. See *infra* note 16. Without even citing that authority, however, the majority arbitrarily limits opt-out rights to actions certified under FED.R.CIV.P. 23(b)(3), see maj. op. at 987 [A-111] n.16, exalting an irrelevant technicality over the underlying reality and creating a circuit split in the process.

Earlier this year, the Third Circuit firmly held that class counsel cannot adequately represent both extant and latent claimants in a futures-only asbestos class

action. *Georgine* v. *Amchem Prods.*, 83 F.3d 610, 630-31 (3d Cir. 1996). The court explained that while extant claimants — those who have already incurred injuries — desire immediate, unlimited recovery from the trust, latent claimants — those who have yet to suffer an injury — desire that recovery be capped or delayed to ensure that extant claimants will not deplete the fund. *Id.*

The majority mentions *Georgine* only in a brief footnote, distinguishing it on the ground that the *Georgine* settlement provides a detailed claims resolution schedule, while the *Ahearn* settlement does not. See maj. op. at 976 [A-88] n. 8. Class counsel still served conflicting interests, however, and postponing some distributional issues until after certification and appeal hardly makes them disappear. The majority may prefer the devil it does not know to the devil it does, but I am loath to make that decision for an entire class of people who are not even aware that we are "adjudicating" their rights.

On the other hand, the majority is correct that *Keene* is easy to distinguish, for the defendant in that action was forthright: Instead of retaining plaintiffs' counsel and having them file a complaint asserting claims they had no intention of pursuing (as occurred here), the asbestos manufacturer asked the court to oversee the negotiation of a settlement. See *Keene*, 14 F.3d at 728-29. The Second Circuit dismissed the action, finding that "it is a self-evident evasion" of the Bankruptcy Code, "the exclusive legal system established by Congress for debtors to seek relief." *Id.* at 732. Future defendants presumably will draw one of two conclusions: Involve the court as little as possible in settlement class actions, or file in the Fifth Circuit.

In sum, the settlement fails either a customary legal analysis or a common-sense smell test. I respectfully but vehemently dissent from all but part III of the majority opinion.

II.
FACTS AND PROCEDURAL HISTORY.

Though the background to this case is somewhat complicated, the key facts are hard to overlook. Fibreboard approached four plaintiffs' lawyers, including Ron Motley and Joe Rice, and suggested that they negotiate a "global settlement" of all of Fibreboard's asbestos liabilities. The negotiations initially failed, perhaps because of the massive scope of the undertaking.

Fibreboard then adopted a risky strategy of assigning claims against its insurers in settlement of individual suits. The danger was that these settlements arguably violated the insurance policies. Fortunately for Fibreboard, a California court approved the deals.

Then something odd happened: Fibreboard settled a large number of cases with Ness Motley — Motley and Rice's law firm — by assigning insurance assets, and brought an action in the Eastern District of Texas seeking approval of the settlement. Why would Fibreboard, a California company, roll the dice in Texas when it had already won in California? Because something important had happened in Pennsylvania.

The Judicial Panel on Multidistrict Litigation had transferred all pending asbestos cases not yet on trial to a district court in Pennsylvania. See *Georgine* v. *Amchem Prods.*, 83 F.3d 610, 619 (3d Cir. 1996). Then-Chief Judge Robert Parker of the Eastern District of Texas wrote a letter to the transferee judge, telling him that he (the Pennsylvania judge) was "the Eisenhower of this D-Day operation" and encouraging him to prod the parties to a global settlement. See Coffee, *supra* note 1, at 1390.

When the plaintiffs' steering committee rejected such a proposal, twenty defendants approached a minority faction of the committee — Motley and Gene Locks — and reached a global settlement with them. See *Id.* at 1391-92, 1457. Actually, they made a series of deals: a

class action settlement for future asbestos victim claimants and separate settlements for the lawyers' pre-existing, individual clients.

The separate settlements were significantly more lucrative than the class one. See *Id.* at 1392-93; Koniak, *Feasting*, *supra* note 4, at 1052. In fact, Motley received fifty percent more for his own clients than he did for those in the class. See Coffee, *supra* note 1, at 1397; Koniak, *Feasting*, *supra* note 4, at 1067. The Third Circuit rejected the settlement, finding that class counsel — including Motley — were hopelessly conflicted. See *Georgine*, 83 F.3d at 630-31.

As the *Georgine* negotiations concluded, Fibreboard and Ness Motley settled a number of cases and, as noted above, filed an action in Chief Judge Parker's court. Fibreboard thereby secured class counsel with a track record of making global settlements and a judge with a demonstrated commitment to them.

Following the *Georgine* pattern, class negotiations reached an impasse over the future of Ness Motley's remaining cases against Fibreboard. The court-appointed "Settlement Facilitator," Judge Patrick Higginbotham, then suggested that they settle those cases before attempting further negotiation of a global settlement. After concluding the Ness Motley deal — which settled the individual claims for higher-than-average amounts, contingent upon successful completion of a global settlement — Fibreboard and class counsel resumed negotiation of such a settlement.

As those negotiations drew to a close, Chief Judge Parker intervened, taking counsel to his house for a final mediation session. It appears that he was successful, for defense counsel eventually increased their offer to an amount that class counsel later accepted.

Class counsel then filed a complaint in Chief Judge Parker's court, along with motions to certify the class

and approve the settlement. The judge certified the class and found that the settlement was fair.

And Fibreboard's stock soared.[6]

III.
THE FOREST FOR THE TREES.

The majority commits two fundamental errors: first, treating justiciability, due process rights, and certification criteria as mere annoyances to be brushed aside in pursuit of what it believes to be the greater good; and second, failing to assess the aggregate effect of its restrictions on asbestos victims' due process rights.

Justiciability and certification requirements are indispensable in any class action. Justiciability looks, among other things, to whether a person has suffered a legally cognizable injury. If an individual has not been legally injured, it is unlikely that he would receive notice of the action or realize that he is a member of the class. Even if he became aware of the action's potential effect on his legal rights, he would likely remain apathetic: Any effect on him is remote in time and contingent on the future development of a disease or other damage or injury. Thus, such class members are especially vulnerable to abuse by class counsel.

Similarly, certification criteria such as commonality, typicality, and adequacy of representation ensure that representative litigation is truly representative. If class counsel stand to gain from selling out the class or from benefiting one subgroup of claimants over another, some or all class members are deprived of a meaningful opportunity to be heard — one of the most fundamental of all due process rights.

The majority addresses each class protection device in isolation, always finding that the protection does not

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6 **See Coffee, *supra* note 1, at 1402 & n. 232.**

apply because of a legal rule developed in a different context or an historical analogy that fails to recognize the novelty of this action. Such tunnel vision obscures the fact that while a particular protection might not always be necessary, some combination of protections is. When courts remove all meaningful safeguards — as the majority does here — class members suffer dramatically.

A. THE DANGER INHERENT IN REPRESENTATIVE LITIGATION.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party . . . ." *Hansberry* v. *Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). This "deep-rooted historic tradition that everyone should have his own day in court," 18 CHARLES A. WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE (hereinafter "WRIGHT & MILLER") § 4449, at 417 (1981), creates the core of due process: the rights to notice, to control one's own case, and to an opportunity to be heard.

The class action device is an equitable exception to this bedrock principle. See *Hansberry*, 311 U.S. at 41, 61 S.Ct. at 117-18. Not surprisingly, such a "fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems." *Mars Steel Corp.* v. *Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 678 (7th Cir. 1987). More bluntly, "class actions are extraordinary proceedings with extraordinary potential for abuse." *General Motors Corp.* v. *Bloyed*, 916 S.W.2d 949, 953 (Tex. 1996).

Accordingly, the Constitution's guarantee of due process requires us to use this joinder device carefully: In exchange for losing the right to prosecute his own action, a class member must receive a variety of substitute protections. See *Phillips Petroleum Co.* v. *Shutts*, 472

U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985); *Hansberry*, 311 U.S. at 45, 61 S.Ct. at 119-20. Though the Supreme Court has largely refrained from determining the scope of those protections, its scant jurisprudence establishes two related principles: First, the extent to which due process requires procedural protections necessarily depends upon the extent to which class members' interests are infringed;[7] and second, we must meet new uses of the device with new protections.[8]

In short, the safeguards required by due process necessarily differ according to the type of action, and when confronted with a new animal, we must analyze those safeguards anew. Reliance on strained analogies to inapposite traditional actions leaves us in what one commentator has aptly labeled a "due process quandary."[9] Thus the irony: The majority eviscerates well-established due process protections because of

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7 See *Shutts*, 472 U.S. at 808-11, 105 S.Ct. at 2972-74 (finding that opt-out right, rather than opt-in requirement, adequately protects class members in light of burdens imposed on them).

8 See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950) (balancing interests of class members and efficient operation of modern investment trusts). The majority's assertion that "[t]he rule that adequate representation is all that due process requires for the traditional mandatory class action in equity was not challenged by *Shutts*," maj. op. at 986 [A-111], is erroneous. The *Hansberry* court reserved judgment on what other procedures might be required, see 311 U.S. at 43-44, 61 S.Ct. at 118-19, and the Court later found that members of mandatory classes have an additional due process right to adequate notice, see Mullane, 339 U.S. at 318-19, 70 S.Ct. at 659-60. Nor did *Shutts* construe *Hansberry* so narrowly. See *Shutts*, 472 U.S. at 808-09 n.1, 105 S.Ct. at 2972-73 n.1 ("The holding in *Hansberry*, of course, was that petitioners in that case had not a sufficient common interest with the parties to a prior lawsuit such that a decree against those parties in the prior suit would bind the petitioners.").

9 See Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C.

(*concluded on page A-140*)

the "unique facts" of the case, see maj. op. at 993 [A-125], but fails to recognize that those novel facts may actually call for enhanced, not lessened, protections for vulnerable asbestos victims.[10]

B. VULNERABILITY OF THE CLASS.

This case is indeed such a new animal. The district court certified a class

(1) including people who have not yet been injured or do not yet know that they have been injured;

(2) excluding all present claimants;

(3) for settlement purposes only;

(4) in a mandatory action seeking predominately monetary damages.

Certification of futures-only actions creates a massive potential for abuse. Many putative future claimants have manifested no symptoms and do not even know they were exposed. Others are the future spouses and children of asbestos victims, most of whom either do not exist or could not possibly know that they are class members. Thus, the due process standbys — notice and an opportunity to be heard — are meaningless to countless future claimants.[11]

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DAVIS L.REV. 871, 911-12 (1995); cf. William W. Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revisited?*, 94 MICH. L.Rev. 1250, 1255 (1996) (observing that appropriate accommodation of competing interests differs according to nature of class and claims).

10 We need not consider the outer limits of due process in this case, however, as the district court failed to employ even basic protections such as opt-out rights and adequate representation.

11 See *Ivy* v. *Diamond Shamrock Chems. Co. (In re Agent Orange Prod. Liab. Litig.)*, 996 F.2d 1425, 1435 (2d Cir. 1993) (observing

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Moreover, future claimants are, by definition, persons who have not yet developed a sufficient interest in their claims to file suit; thus, they are likely to be passive and particularly vulnerable to exploitation.[12] Finally, courts have a rotten track record with futures-only actions: Of the two largest such actions, one is *Georgine*, and the other settlement fell apart because the parties radically underestimated the number of claimants. See Coffee, *supra* note 1, at 1417-18 (discussing failure of Dow Corning settlement).

These concerns are mitigated somewhat by the breadth of the "futures" class. Some members are presently injured and aware of their injuries, and some have even spoken with lawyers. While most of these claimants might not have retained counsel for the sole purpose of intervening, some might have, and others at least might have chosen to opt out, had that protection not been removed as well.[13] Of course, any such intervenors protect only their own interests, which differ dramatically from those of class members who are not presently injured. See *infra* part VI.A.2. Thus, futures-only classes are still highly vulnerable to abuse.

This case also presents a radical extension of the mandatory class action. The class complaint seeks, and the settlement provides, predominately monetary relief.

(*continued from page A-140*)

that "providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good"), *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1125, 127 L.Ed.2d 434 and *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1126, 127 L.Ed.2d 434 (1994); see generally Marcus, *supra* note 4, at 889 (explaining that the notice given to *Ahearn* class members was particularly hard for them to understand).

12 See Crampton, *supra* note 4, at 828.

13 Two groups of plaintiffs intervened in this action. Thus, while exclusion of present claimants appears to have limited the opposition, it did not completely eliminate it.

While historically we have permitted mandatory actions when a class sought to litigate joint rights regarding a common fund, the only common fund in this case is the settlement proceeds. To the extent that there is a limited fund, it is a contrived one, created by the litigation and settlement strategies of Fibreboard and its insurers. See *infra* note 17.

The concept of a futures-only mandatory action is also self-contradictory. If we must bind victims in the class in order to protect their rights and ensure an equitable distribution, then we must bind all such victims, not just some. Limiting the class to future claimants grants the equivalent of an automatic opt-out to present claimants, and there is simply no principled way of distinguishing the one group from the other.[14]

Arbitrariness in the class definition might not present a problem by itself, but future claimants, unlike present claimants, are particularly vulnerable. Exclusion of all present claimants has the effect (if not the purpose) of excluding all those who are likely to receive notice, monitor the class action, and oppose the class attorneys' conflicts and other inadequacies.[15]

Finally, this is a settlement class action. Permitting such actions creates an unparalleled opportunity for collusion between defendants and class counsel, as both stand to gain from negotiating a deal providing generous fees for counsel and meager recovery for the class. See *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir.), *cert.*

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14 See Koniak, *Feasting*, *supra* note 4, at 1058; Crampton, *supra* note 4, at 829-30.

15 In addition, the settlement's silence regarding the actual compensation that claimants can expect — other than various caps and limitations on recovery — makes it difficult for class members and courts to evaluate the settlement. That lack of information might be one of the reasons that the intervenors chose not to attack the settlement's substantive fairness on appeal.

denied, ___ U.S. ___, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995); Crampton, *supra* note 4, at 826-27. Moreover, a defendant may pick his opposing counsel and then negotiate with absolutely nothing to lose from walking away from the deal; class counsel, on the other hand, work pro bono unless they consent to a settlement.

If nothing else, use of a mandatory settlement action with an automatic opt-out for all those likely to intervene, and no opt-out for anyone else, raises a red flag. To the best of my knowledge, no one has ever attempted to do such a thing before: Even the now-discredited *Georgine* settlement permitted opt-outs.

C. DIMINISHED PROTECTION FOR THE CLASS.

A novel action laden with such an extreme potential for abuse certainly demands a close look, but the majority accepts the settling parties' distortion of that background reality and actually ratchets down the degree of protection accorded absent class members.

The *Ahearn* settlement is really two agreements: one between Fibreboard and the insurers to settle their policy disputes for $1.525 billion, and another between the futures class and Fibreboard to limit the class's recovery to insurance proceeds plus $10 million of Fibreboard's $225-250 million net worth. Fibreboard and the insurers did not need class proceedings to reach the first agreement. Avoiding an all-or-nothing judgment in the California coverage litigation gave them a powerful incentive to settle, regardless of whether they could extinguish future claims at the same time. As the majority observes, "*None* of the parties was prepared to take the enormous risk inherent in that litigation." Maj. op. at 993 [A-125] (emphasis added). In fact, Fibreboard and the insurers did reach such a settlement. See maj. op. part III (unanimously approving that agreement).

With that cloak removed, the second half of the *Ahearn* settlement is wholly baseless. The class mem-

bers surrendered their claims against Fibreboard, submitted to an arbitration procedure, and agreed to a total cap on damages, individual caps on damages, an absolute ban on punitive damages, and other restrictive provisions. In exchange, Fibreboard gave the class a mere $10 million — less than five percent of its net worth. Fibreboard sought certification based upon a constructive bankruptcy theory, but it walked away with barely a scratch. Not surprisingly, Fibreboard's stock skyrocketed when the settlement was announced. See Coffee, *supra* note 1, at 1402 & n. 232.

Even accepting the settling parties' mischaracterization of the settlement does little to justify certification, however, for traditional class protections still prevent it.

IV.
DUE PROCESS AND THE RIGHT TO OPT OUT.

The majority's treatment of opt-out rights is a paradigmatic example of its erroneous reasoning. Though the Court plainly held in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985), that class members have a right to opt out of actions (such as this) seeking primarily monetary relief, the majority refuses to recognize that right, on the ground that it was not historically available in traditional "common fund" litigation.

The majority's holding that all rule 23(b)(1) class actions are immune from *Shutts* is in direct conflict with the holding of a sister circuit.[16] Moreover, this case pre-

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16 The Ninth Circuit has held that a class action certified under rule 23(b)(1) and (b)(2) cannot bind absent plaintiffs unless they are allowed to opt out. *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992) (holding that absent plaintiffs were not bound by a rule 23(b)(1)-(b)(2) class action for money damages, because the original class action court did not have personal jurisdiction over the plaintiffs and did not provide them with an opt-out right), *cert. dismissed as improvidently granted*, 511 U.S. 117, 114 S.Ct. 1359, 128

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sents anything but a traditional common fund,[17] and the majority's attempt to analogize it to an action to settle a

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L.Ed.2d 33 (1994). See also *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir.) (reversing an injunction and allowing a collateral attack against a rule 23(b)(1)-(b)(2) class action to proceed in a different jurisdiction), *cert. denied*, 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed.2d 44 (1989). In *dictum*, the Second Circuit has recognized that a rule 23(b)(1) action that aggregates claims seeking legal remedies requires an opt-out right. *In re Joint E. & S. Dist. Asbestos Litig. (Findley I)*, 982 F.2d 721, 735 (2d Cir. 1992) (upholding a mandatory class action by beneficiaries of a trust but recognizing that "[i]f the members of the plaintiff class were not all beneficiaries of the Trust, we would think that the applicable standards for personal jurisdiction would be drawn more from *Shutts* than from *Hansberry*"); *In re Joint E. & S. Dist. Asbestos Litig. (Findley III)*, 78 F.3d 764, 777-78 (2d Cir. 1996) (distinguishing the class action from that in *Shutts* because the restructuring of a trust is an equitable remedy).

17 The paradigmatic use of rule 23(b)(1)(B) is for a common (or limited) fund, which exists

> when a fixed asset or piece of property exists in which all class members have a preexisting interest, and an apportionment or determination of the interests of one class member cannot be made without affecting the proportionate interests of other class members similarly situated. Classic illustrations include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, process of a ship sale in a maritime accident suit, and others.

1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS (hereinafter "NEWBERG ON CLASS ACTIONS") § 4.09, at 4-32 through 4-33 (3d ed. 1992). The language of rule 23(b)(1)(B) is broad enough to encompass more than the traditional common fund, *Id.* at 4-31, and the fact that an action meets the requirements of rule 23(b)(1)(B) does not necessarily transform it into one for the division of a fund.

This case deviates from the traditional common fund in a number of ways. First, there is no fund to speak of. The insurance proceeds are not common or limited, but are simply all that the defendants are willing to provide to the settlement. A settlement offer is far from "a fixed asset . . . in which all class members have a preexisting interest." The fact that Fibreboard's asbestos liabilities are greater than its assets is also insufficient to create a common

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trust is entirely unjustified: Far from adjudicating equitable rights in a preexisting fund, the settlement creates a common fund by extinguishing personal rights of action. In short, the majority rationalizes its eviscera-tion of a right that we have already recognized with a call to historical rigidity.

A. BASIC REQUIREMENTS OF THE SHUTTS CASE.

Shutts could not be more unambiguous:

> [W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

472 U.S. at 812, 105 S.Ct. at 2974-75 (citations and footnotes omitted). The Court, however, specifically limited its holding to claims "for money damages or similar relief at law," as opposed to actions seeking "equitable relief."[18] Thus, *Shutts* teaches that in an action seeking money damages, an absent plaintiff is entitled to the right to opt out.[19]

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fund, even though it is sufficient to meet the requirements of rule (b)(1)(B). See Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 42 (1986) (describing the "constructive bankruptcy" theory for certifying mass torts under rule (b)(1)(B)). See also Marcus, *supra* note 4, at 877-81 (suggesting that a common fund theory does not work for mass torts). Second, the plaintiffs do not have a preexisting interest in Fibreboard's assets; the purpose of the suit is to establish those rights and not to divide preexisting rights.

18 472 U.S. at 811 & n. 3, 105 S.Ct. at 2973-74 & n. 3 ("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief.").

19 Although *Shutts* involved a state court action, the consensus view is that it applies to federal class actions as well. See *Matsushita*

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Following *Shutts*, a mandatory class action is viable in two cases: (1) where the court has jurisdiction over all the plaintiffs or (2) where the plaintiffs seek equitable relief. Unlike the majority, I believe that whether a class action seeks equitable relief or money damages can be determined only by focusing on the underlying remedy the plaintiffs seek. See, e.g., *Findley I*, 982 F.2d at 735 (affirming certification of a mandatory class action but noting that it would violate due process if the request for relief were for money damages rather than division of a trust).

If one focuses on the plaintiffs' remedy, the *Ahearn* class cannot be characterized as one "seeking equitable relief." The complaint alleges only personal causes of action against Fibreboard for money damages.[20] The prayer for relief seeks general and special compensatory damages, punitive damages, costs of the suit, appropriate declarations and orders, and other relief as may be deemed just and proper. These remedies represent paradigmatic legal remedies.[21] 1 DAN B. DOBBS,

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Elec. Indus. Co. v. *Epstein*, ___ U.S. ___, ___, 116 S.Ct. 873, 888, 134 L.Ed.2d 6 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("In [*Shutts*], this Court listed minimal procedural due process requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right to opt out, and adequate representation."); *Carlough* v. *Amchem Prods., Inc.*, 10 F.3d 189, 198-99 (3d Cir. 1993); *Brown*, 982 F.2d at 392; *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992) (*dictum*), *cert. dismissed*, 506 U.S. 1088, 113 S.Ct. 1070, 122 L.Ed.2d 497 (1993); *In re Real Estate Title*, 869 F.2d at 766 n. 6. See also Miller & Crump, *supra* note 17, at 29-31.

20 The specific counts in the complaint are (1) negligent failure to warn; (2) strict product liability; (3) breach of express and implied warranty; (4) concert of action and conspiracy; and (5) "all other viable claims." The last count consists of every "claim or cause of action" that the plaintiffs can assert against Fibreboard.

21 See also Marcus, *supra* note 4, at 888 ("[T]he limited fund concept should rarely, if ever, be available in mass tort litigation. Even if it can be sustained in some instances, there is no denying that the claims asserted are for compensatory damages, and there is arguably a constitutional right to opt out.").

DOBBS LAW OF REMEDIES (hereinafter "LAW OF REMEDIES") §§ 3.1-3.2 (2d ed. 1993). The majority, maj. op. at 976 [A-88], agrees: "The central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos."

B. THE MAJORITY'S CIRCUMVENTION OF SHUTTS.

The majority circumvents *Shutts* by calling *Ahearn* an equitable action.[22] Instead of focusing on the plaintiffs' remedies, the majority characterizes the action based on which subsection of rule 23 the court invoked to certify the class. From the historical fact that rule 23(b)(1)(B) originated in courts of equity, the majority concludes that all actions certified under rule 23(b)(1)(B) are equitable and thus immune from *Shutts*.

1. Conflict with Other Circuits.

The majority's holding is in direct conflict with decisions of the Third and Ninth Circuits. See *Brown*; *In re Real Estate Title*. The Ninth Circuit has directly held that *Shutts* applies to rule 23(b)(1)-(b)(2) actions when the plaintiffs' underlying claims are for money damages.

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22 See maj. op. at 986 [A-110] ("The limitation of *Shutts* to claims of unknown plaintiffs that are predominantly for money damages forecloses application of its holding to 23(b)(1)(B) actions which have always been equitable and often involve unknown plaintiffs."). The majority also intimates that *Shutts* does not apply to rule 23(b)(1)(B) actions because the absent plaintiffs are unknown. See maj. op. at 986 [A-110-A-111]. The unknown-plaintiff exception in *Shutts* does not apply to this case, however.

The court lacks personal jurisdiction over a large number of known plaintiffs who have manifested injuries but failed to file suit before the class action was filed. Moreover, a large number of the exposure-only plaintiffs are known. For example, shipyard workers who have not yet manifested any sign of disease could easily be identified and notified of the settlement. They then could decide whether to opt out. If they did, their individual and derivative wrongful death claims no longer would be part of the settlement.

Brown, 982 F.2d at 392. The Third Circuit also has recognized that a mandatory class action does not have a res judicata effect on absent class members when the underlying claims are for money damages and the court did not have personal jurisdiction over the plaintiffs. *In re Real Estate Title*, 869 F.2d at 768-69. The majority fails to discuss either case.

Both cases arose out of the same antitrust class action. See *Brown*, 982 F.2d at 388-89. The original class complaint sought money damages and injunctive relief and was certified under rule 23(b)(1) & (b)(2). *In re Real Estate Title*, 869 F.2d at 760, 763. The action settled on terms favorable to the defendant, and a number of absent plaintiffs were left without a settlement check.

The first case challenging the no-opt-out class action arose by way of injunction in the Third Circuit. Following settlement of the class action, a number of absent plaintiffs filed a new suit against the same defendants for the same activity. The defendants asked the district court that heard the original class action to enjoin the Arizona state court suit. *In re Real Estate*, 869 F.2d at 762. The district court granted the injunction, but the Third Circuit reversed, classifying the original class action as a hybrid suit seeking both money damages and equitable relief. *Id.* at 768-69. The court applied *Shutts* and held that the district court did not have personal jurisdiction over the absent plaintiffs in the original action and that it would violate due process for the court to enjoin a collateral attack on the class action. *Id.*

The other shoe dropped in a subsequent action filed in federal court in Arizona. The defendants raised a res judicata defense to the plaintiffs' claim, pointing to the class action settlement. The Ninth Circuit rejected the defendants' arguments, holding that the class action did

not have a res judicata effect on absent plaintiffs over whom the district court in the original class action did not have personal jurisdiction. *Brown*, 982 F.2d at 392. The court relied on *Shutts* and held that the absent plaintiffs' money damage claims could not be foreclosed by a rule 23(b)(1) class action, because the action did not include a right to opt out. *Id.*[23]

2. Conflict with Shutts.

The majority's approach to classifying this action is also fundamentally at odds with the approach used by the *Shutts* Court. The exception in *Shutts* is for actions seeking "equitable relief," not for class actions that have their origins in equity.[24] The Court explicitly recognized that class actions originated as an equitable joinder device, and all class actions are "equitable" in that limited sense. *Shutts*, 472 U.S. at 808, 105 S.Ct. at 2972-73. See also *Hansberry* v. *Lee*, 311 U.S. 32, 41, 61 S.Ct. 115, 118, 85 L.Ed. 22 (1940) ("The class suit was an invention of equity . . . ."); 7A WRIGHT & MILLER § 1751,

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23 The court also held that the absent plaintiffs' claims for injunctive relief were barred by res judicata because the class action could bind absent plaintiffs on their claims for equitable relief. *Brown*, 982 F.2d at 392.

24 It is notable that the *Shutts* Court used the phrase "equitable relief." *Shutts*, 472 U.S. at 812 n.3, 105 S.Ct. at 2974 n.3. Equity courts were distinguished from law courts in that their substantive rules, procedures, and remedies differed from law courts. 1 LAW OF REMEDIES § 2.6(3) at 154-55. As one commentator pointed out, procedure "will seldom if ever form a basis for distinguishing law from equity" where the distinction matters. *Id.* at 155 n.1.

The question then becomes whether the class action is an equitable remedy or an equitable procedural device. I discuss why the rationale of *Shutts* supports that latter interpretation at *infra* part IV.B.3. Further support for the obvious proposition that the class action is a procedural tool comes from the fact that it has never been treated as a "remedy." See 1 LAW OF REMEDIES §§ 1.1-1.6 (listing all remedies available at law and equity).

at 7. Despite that fact, the Court classified the action in *Shutts* as one for money damages. 472 U.S. at 811, 105 S.Ct. at 2974.

The only possible conclusion that can be drawn from the Court's reasoning is that the distinction between damage remedies and equitable remedies turns on what remedies the plaintiff seeks, not on his choice of joinder devices. To hold otherwise, as the majority does in this case, would create an internal inconsistency in *Shutts*: If the origin of the class action is determinative of the classification of an action, then every class action, including the one in *Shutts*, would be an equitable action.

3. Misunderstanding Equitable Remedies.

The majority's assertion that rule 23(b)(1)(B) actions are unique in that they involve only equitable claims is based on an apparent misunderstanding of "equitable remedies" and the history of the class action. Prior to the merger of law and equity, the majority would have been correct in classifying all rule 23(b)(1)(B) class actions (or more appropriately their historical antecedents) as equitable actions, but for reasons different from those the majority offers.

Before law and equity were merged, every class action would have been equitable, as the class action was a procedural device that was available only in courts of equity.[25] As a result, every class action aggregated claims seeking equitable remedies or applying equitable substantive law. The fact that the device was once used exclusively by equity courts does not fore-

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25 **The class action originated in courts of equity as a procedural joinder device. See generally 1 LAW OF REMEDIES § 1.1, at 1-2 (distinguishing procedural law, substantive law, and remedial law); *Id.* § 2.1(1), at 57 (noting that differing procedures were available in equity and legal courts).**

close the possibility, however, that the device currently is used in conjunction with legal remedies.[26]

Even the majority's own authorities recognize that class actions are now used to aggregate both legal and equitable claims. See 1 NEWBERG ON CLASS ACTIONS § 1.18, at 1-46 (recognizing that suits certified under rule 23(b)(1) "predominately (but not exclusively) involve suits seeking equitable relief"). When Professor Newberg posits that *Shutts* will not apply to classic limited fund cases, he does so because those cases aggregate equitable claims, not because the device had its origins in equity.

> It is unlikely that *Shutts* will be construed to change the highly focused nature of the *equitable relief* addressed in these limited fund class actions by requiring opt-out rights which might serve to frustrate the equitable ends of these suits. There are other types of equitable class actions, such as suits to declare a dividend or suits for injunctive relief against a defendant who has acted generally against a class, which similarly . . . will not be challenged.

Id. § 1.21, at 1-49 (emphasis added, footnotes omitted).

4. Formalistic Distinctions.

The majority's unyielding mantra that rule 23(b)(1) actions are equitable actions makes due process turn on an untenable formalistic distinction between rule 23(b)(1) and rule 23(b)(3), whereunder class actions under rule 23(b)(3) are subject to *Shutts*, and those cer-

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26 In similar situations, where an equitable procedural device has been extended to actions at law, courts have used at least two distinct tests for determining equitable status. The first test focuses on the remedy: If the claim seeks a coercive remedy, it is deemed equitable. The second test characterizes a claim as equitable if the plaintiff seeks to enforce a right that was originally created in the equity courts, or a right that was traditionally decided according to equitable principles. 1 LAW OF REMEDIES § 2.6(3), at 154-55.

tified under rule 23(b)(1) are not. The distinction finds no support in *Shutts*, which involved a state equivalent of rule 23(b)(3) and not the federal rule itself. The Court's analysis, which centered on the need to protect an absent plaintiff from the inherent dangers of representative actions, did not focus on what type of class action was involved, for relying on such a distinction ignores the fact that many class actions can be certified under more than one subsection of rule 23. 1 NEWBERG ON CLASS ACTIONS § 4.01, at 4-4 through 4-5; 3B J.W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.31[3], at 236-37 (2d ed. 1995); 7A WRIGHT & MILLER § 1772, at 425. In fact, a vast majority of classes that meet the requirements of rule 23(b)(1)(B) inevitably will satisfy the rule 23(b)(3) requirements. 1 NEWBERG ON CLASS ACTIONS § 4.01, at 4-5. Due process does not turn on such formalistic distinctions.[27]

C. THE DISTINCTION BETWEEN LAW AND EQUITY.

The majority's argument that applying *Shutts* to rule 23(b)(1) would render all mandatory class actions unconstitutional, is also premised on a faulty understanding of the distinction between law and equity. See maj. op. at 987 [A-111] n.16. What the majority fails to acknowledge is that the distinction between money damages and equitable remedies preserves mandatory

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27 *Browning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 299, 109 S.Ct. 2909, 2933, 106 L.Ed.2d 219 (1989) (O'Connor, J., concurring in part and dissenting in part) (stating that "the applicability of a provision of the Constitution has never depended on the vagaries of state or federal law"); *Escobedo* v. *Illinois*, 378 U.S. 478, 486, 84 S.Ct. 1758, 1762, 12 L.Ed.2d 977 (1964) (declining to "exalt form over substance" in determining the temporal scope of Sixth Amendment protections); *Crowell* v. *Benson*, 285 U.S. 22, 53, 52 S.Ct. 285, 293, 76 L.Ed. 598 (1932) (opining that "regard must be had, . . . in . . . cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required"); *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 235, 17 S.Ct. 581, 584, 41 L.Ed. 979 (1897) ("In determining what is due process of law regard must be had to substance, not to form.").

class actions in the vast majority of cases, including traditional common fund cases from equity. See NEWBERG ON CLASS ACTIONS § 1.18, at 1-46 (recognizing that the majority of actions that meet the requirements of rule 23(b)(1) seek equitable relief). The only cases affected by *Shutts* are modern cases, such as *Ahearn*, that fall within the broad scope of the rule but do not involve a true common fund.

Take for example *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 14 L.Ed. 942 (1853), and *Hartford Life Ins. Co.* v. *Ibs*, 237 U.S. 662, 35 S.Ct. 692, 59 L.Ed. 1165 (1914), two cases that represent the paradigmatic mandatory class action. Both survive *Shutts* because neither involved money damages. In Smith, the class representatives filed a bill in chancery for the division of a trust, a traditional equitable remedy.[28] 57 U.S. (16 How.) at 312. See 1 LAW OF REMEDIES § 2.3(1), at 75. In *Ibs*, the mandatory class action at issue also involved distributions from a trust.[29] 237 U.S. at 671, 35 S.Ct. at 695. Although both actions resulted in a distribution of money, neither involved a legal claim for money damages. See 1 LAW OF REMEDIES § 3.1 (discussing money awards available in equity, but distinguishing between money damages and equitable remedies that award money).

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28 The suit was over proceeds from a book fund maintained by the Methodist Episcopal Church. Smith, 57 U.S. (16 How.) at 303. The fund was established for the care of traveling preachers. *Id.* When the church divided over slavery, both sides agreed to split church property based upon a prearranged formula. *Id.* at 305. The traveling preachers from the south sued the northern church because it refused to relinquish that portion of the fund that belonged to the southern church. *Id.*

29 *Ibs* involved a suit, for money damages, by a participant in a mortuary fund in state court. The question was whether a prior mandatory class action would have a res judicata effect on the plaintiff. The class action was against an insurance company and sought to compel the company to make distributions from a trust. The court held that the action against the trust must be given res judicata effect in the later proceeding.

The difference between legal and equitable actions, while subtle, is important. In an equitable action such as an action by the beneficiary of a trust, a plaintiff's pro rata rights to the trust corpus are already established. Whether the action proceeds individually or as a class action is irrelevant to absent plaintiffs, because in both cases their rights in the corpus of the trust will be affected. See *In Re Joint E. & S. Dist. Asbestos Litig. ("Findley II")*, 878 FSupp. 473, 530-33 (E. & S.D.N.Y. 1995) (explaining why the already severe limitations on a trust beneficiary mean that a representative action will do little to diminish a beneficiary's rights). In fact, in some cases the class device enhances an absent plaintiff's rights by providing him a voice; the classic limited fund is such a case. The same is not true in a case for money damages.

The decision to proceed individually or as a class makes all the difference in a case for money damages, because only in a class action are a plaintiff's rights controlled by another party. The most obvious consequence of such control is that class representatives may settle to the detriment of absent class members in order to benefit themselves. The inherent risk of such a result is exactly what drove the Court to adopt due process protections in such cases. See *Shutts*, 472 U.S. at 809-11, 105 S.Ct. at 2973-74.

D. UNCONSTITUTIONAL USE OF THE FEDERAL RULES.

Finally, the majority's reliance on the strong presumption of constitutionality that the Federal Rules of Civil Procedure receive is misplaced. The novelty in this case is not the insistence on opt-out rights but on the extension of class actions, particularly rule 23(b)(1)(B) class actions, to mass torts and the expansion of rule (b)(1)(B) to "constructive bankruptcy." Such a use of the federal rules is novel, and in particular the rise of mass torts was unforeseen by the drafters of the rule. *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 & n. 23 (5th Cir. 1996).

The majority's attempt to hide behind the traditional acceptance of mandatory class actions is unavailing in this extension of rule 23(b)(1), for the presumption of constitutionality enjoyed by the Federal Rules of Civil Procedure disappears when the rules are applied in a way unanticipated by their drafters. See 19 WRIGHT & MILLER § 4509. In short, while this action falls within the broad scope of rule 23(b)(1)(B), that fact does not immunize it from due process protections, including opt-out rights.[30]

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30 The appellees argue that even if due process requires an opt-out right, the settlement's "back-end" exit satisfies due process. Even if a "back-end" exit could serve as a proxy for an opt-out provision — a suggestion made only by the Fourth Circuit — the procedure provided in *Ahearn* falls far short of satisfying due process. See, e.g., *In re A.H. Robins Co.*, 880 F.2d 709, 745 (4th Cir.) (finding that a "back-end" exit right provides "everything that an express opt-out provision could give a class member if such right is required under due process"), *cert. denied*, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989).

In *A.H. Robins*, the court could determine with confidence that the "back-end" exit provided absent plaintiffs with the same rights they would have in an opt-out class action. The class action involved a trust established during a chapter 11 bankruptcy. *A.H. Robins*, 880 F.2d at 717. An absent class member could seek a jury trial if the alternative dispute resolution provided for by the trust did not settle the plaintiff's claim in a satisfactory fashion. *Id.* at 722. Liability, causation, and damages would be submitted to the jury. *Id.* Punitive damages were disallowed, but a plaintiff seeking a jury trial would be entitled to an amount from the trust in lieu of the punitive damage award. *Id.* The exit mechanism left absent plaintiffs a right to a jury trial on precisely those issues on which they had a right to a jury trial before certification. *Id.* at 744 ("The Plan gives every such class member the right to have her claim settled in a trial with all the procedural rights normally attaching to a jury trial. That is everything that an express opt-out provision could give a class member if such right is required under due process.").

The "back-end" exit in this case fails to provide absent plaintiffs with a right substantially equivalent to a jury trial. The exit is nothing more than window dressing. While it allows claimants to settle disputes in front of a jury, it limits all damages to $500,000. By contrast, some plaintiffs have been able to recover several million dollars from asbestos defendants at trial. See, e.g., *Mechanic's*

(*concluded on page A-157*)

V.
COMMONALITY AND TYPICALITY.

The majority is correct that our precedents preclude us from decertifying the class for lack of commonality and typicality. The majority's discussion of these criteria is misleading, however, and its readiness to skip over the protections without considering the consequences is yet another manifestation of its tunnel vision.

A. CIRCUIT PRECEDENT.

Long before defense attorneys even dreamed of mandatory, mass-tort, futures-only class actions, we held that "tentative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge." *Meat Price Investigators Ass'n v. Iowa Beef Processors (In re Beef Indus. Antitrust Litig.)*, 607 F.2d 167, 174 (5th Cir. 1979), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981). We even went so far as to "agree" with Professor Newberg that parties may "compromise their differences, including class action issues, through this means." *Id.* at 177-78 (quoting 3

(*continued from page A-156*)

Family Awarded $14 Million in Auto Brake Asbestos Case, WEST'S LEGAL NEWS, June 20, 1996, at 1996 WL 339400 (discussing asbestos verdict for two plaintiffs); *Asbestos Litigation — Damages*, CHI. DAILY LAW BULLETIN, June 13, 1995, at 1 (discussing $12 million verdict); *Notable Verdicts*, NAT'L LAW JOURNAL, Apr. 15, 1996, at A15 (discussing $2.2 million jury verdict); *Reviewing Verdicts for Excessiveness*, NEW YORK L.J., Apr. 10, 1996, at 1 (discussing verdicts of $64.6 million for four plaintiffs); *$18 Million Verdict for Asbestos Claims*, NEW YORK L.J., Feb. 15, 1996, at 2 (discussing verdict for five plaintiffs). Such a severe limitation on a party's ability to prove and try damages deprives him of an essential element of a jury trial. I certainly cannot say that a procedure that caps a plaintiff's damages gives him "everything that an express opt-out provision could give a class member." *A.H. Robins*, 880 F.2d at 744.

NEWBERG ON CLASS ACTIONS § 5570c, at 476). We took *Beef Industry* to its logical conclusion two years later, finding that evaluation of the fairness of a settlement entails a consideration of "the strength of plaintiffs' case on the merits," including "the risks of class decertification." *Adams Extract Co.* v. *Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 216 (5th Cir. 1981).

Note the bizarre effect of these opinions: Certification criteria are designed in part to protect the class against inadequate representatives, but *Beef Industry* permits those very representatives to compromise the requirements. *Corrugated Container* compounds the effect by holding that certification criteria are part of the merits of a class action. Thus, when it is less likely that certification is proper, and therefore more likely that an individual plaintiff has a right to prosecute his own action, a smaller settlement is necessary to extinguish that right.

The majority is more subtle, finding that all class members have a common interest in reaching a settlement that includes certain terms. See maj. op. at 975 [A-87]. Even so, a generalized common *interest* is not a "*question[] of law or fact* common to the class." FED.R. CIV.P. 23(a)(2) (emphasis added).

Similarly, the majority finds that the legal and remedial theories of the class representatives are typical of those of the class because all class members (1) claim that "Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos" and (2) possess a common interest in settling for a large amount. See maj. op. at 975-76 [A-86–A-87]. Once again, the latter category of "interests" has nothing to do with the underlying legal theories.

The majority's characterization of the plaintiffs' claims is also true only at an extreme level of generality. If a man raped a woman in California and exposed him-

self to another in Texas, both women might claim that he is "liable in tort for damages incurred due to [sexual misconduct]," but no one would seriously claim that the legal theory of battery is similar to that for, say, intentional infliction of emotional distress.

Nor have the settling parties even attempted to bootstrap themselves into typicality by crafting a settlement that postpones resolution of non-typical issues. The settlement's prohibition on punitive damages affects plaintiffs from different states differently; its caps on individual recovery discriminate against the most seriously injured class members; and its spendthrift provisions alter the distribution of funds between extant and latent claimants. Thus, the settling parties have negotiated an alteration of the class members' substantive rights vis-à-vis one another. In short, the majority dutifully follows our precedent by treating commonality and typicality as mere procedural obstacles to be cleared out of the way.

B. PROBLEMS WITH CIRCUIT PRECEDENT.

Three factors make our duty to follow *Beef Industry* and *Corrugated Container* a regrettable one. First, rule 23(a) has a purpose: to protect the due process rights of absent class members.[31] Compliance with the rule might prevent us from lumping people with divergent interests into a single class, but the rule is meant to do just that.[32]

Second, the difficulty inherent in assessing the substantive fairness of a settlement makes prophylactic

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31 See *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995); 1 NEWBERG ON CLASS ACTIONS § 1.13, at 37-38.

32 See Marcus, *supra* note 4, at 899-90 (criticizing *Ahearn* settlement).

procedural protections crucial to the protection of absent plaintiffs.[33] The range of "fair" settlements is wide in any case,[34] and settlement classes present unique opportunities for collusion between class counsel and defendants.[35] Once the machinery of a settlement class action is set in motion, the judiciary has a very hard time controlling it; thus, it is critical that we craft that machinery well.

Finally, the majority once again fails to consider the interaction of these due process protections with the others it denies. Professor Newberg, the primary proponent of settlement classes, justified relaxing the rule 23(a) criteria by looking to other protections, most notably opt-out rights, to protect the class. See 2 NEWBERG ON CLASS ACTIONS § 11.28, at 60-61. Similarly, the Beef Industry court observed that opt-out rights would help "offset" the loss of other protections. See 607 F.2d at 175. Thus, relaxing rule 23(a) criteria and denying opt-out rights make for a lethal combination.[36]

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33 See *Mars Steel Corp.* v. *Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 683 (7th Cir. 1987) ("The agency problems which [class] actions create require that the district judge be vigilant in protecting the procedural rights of class members."); cf. 7B WRIGHT & MILLER § 1785, at 103 ("A formal class certification determination plays an important role in assuring adequate protection to the absent class members.").

34 See Koniak, *Looking Glass*, *supra* note 4, at 18 ("A poisoned or tainted pudding may taste okay, if not delicious.").

35 See *supra* page 1008; *General Motors*, 55 F.3d at 788; Coffee, *supra* note 1, at 1378-82.

36 While I would follow *Beef Industry* and *Corrugated Container* reluctantly, the majority actually embraces them on the ground that settlement negotiations generate information. See maj. op. at 975-76 [A-85–A-89]. While it is hard to argue in favor of ignoring information, settlement negotiations generate little information regarding commonality and typicality, and it is the majority that ignores any such information.

(*concluded on page A-161*)

VI. INADEQUATE REPRESENTATION.

That leaves two significant due process requirements, the first of which is adequate representation. Instead of vigorously enforcing this requirement, however, the majority lets it slide as well.

A. STANDARD OF REVIEW.

In ordinary litigation, a plaintiff does not need the court to ensure that his attorneys are performing adequately; he can monitor and control them himself. In class litigation, however, class members have no practical control over their attorney.[37] Their only remedy against shoddy representation is to opt out of the class,

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(*continued from page A-160*)

First, no competent counsel would enter negotiations without first divining his clients' legal theories and the questions of law or fact underlying them. Thus, "the process of negotiation does not reveal anything about commonality and typicality." *General Motors*, 55 F.3d at 796.

Second, this justification for relaxing the requirements is inconsistent with the majority's application of them. To the extent that diverging interests emerge in negotiations, those interests militate against mass certification, as they indicate that class counsel negotiated the settlement while suffering from a conflict. The majority relies upon the existence of information in relaxing the criteria, but ignores that information when applying them.

Finally, the majority's emphasis on information is ironic. Conventional wisdom posits that early settlement decreases the amount of information available to counsel and the court. See, e.g., MANUAL FOR COMPLEX LITIGATION 3D § 30.45, at 243 (1995).

37 In theory, the class representative should control the attorney. In practice, class counsel often selects the class representative and is likely to pick one who is passive. Cf. *In re Dresser Indus.*, 972 F.2d 540, 545 n.11 (5th Cir. 1992) (noting consent of client in a class action is of "limited utility" as a safeguard against conflicts of interest).

but the district court denied them even that protection. Having left class members defenseless against their own counsel, the court's duty to ensure adequate representation became all the more critical. Rule 23(a)(4) prohibits a court from certifying a class without first ascertaining that it will receive adequate representation. Rule 23's concerns are not merely prudential, but constitutional: Due process demands that class members receive adequate representation before they are bound by a judgment.[38] An attorney who labors under a conflict of interest cannot satisfy the requirements of rule 23(a)(4).[39]

We must not confuse rule 23(a)(4) with rule 23(e), which scrutinizes only the substantive fairness of a settlement.[40] Rule 23(a)(4) guarantees due process, and a

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38 See *Woolen* v. *Surtran Taxicabs*, 684 F.2d 324, 332 (5th Cir. 1982) ("The adequacy of representation in Rule 23(a)(4) is that essential to due process under *Hansberry* v. *Lee*[, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940),] before absent class members can be bound."); *Gonzales* v. *Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973) ("The judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation.") (quoting *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 691, 81 S.Ct. 1309, 1314, 6 L.Ed.2d 604 (1961)).

39 See *North Am. Acceptance Corp.* v. *Arnall, Golden & Gregory*, 593 F.2d 642, 644 n.4 (5th Cir.) (reasoning that attorney's conflict of interest could prevent class certification under rule 23 because of "the important role the attorney plays in protecting the interests of the class"), *cert. denied*, 444 U.S. 956, 100 S.Ct. 436, 62 L.Ed.2d 328 (1979); see also *In re Fine Paper Antitrust Litig.*, 617 F.2d 22, 27 (3d Cir. 1980) (concluding that attorneys with conflict of interest do not meet the adequate representation requirement of rule 23(a)(4)).

40 See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir.) ("We also reject the district court's finding that its authority to approve settlement offers under Fed.R.Civ.P. 23(e) acts to limit the threat to the class from a potential conflict of interest."), *cert. denied*, 484 U.S. 926, 108 S.Ct. 289, 98 L.Ed.2d 249 (1987).

substantively adequate result cannot cure procedural injustice.[41]

More importantly, substantive adequacy does not necessarily mean that a settlement is truly fair; an attorney who negotiated an adequate settlement might have negotiated a better one but for a conflict of interest.[42] Indeed, it would be odd if rule 23(a)(4) did require a court to examine the terms of a settlement; rule 23(a)(4) is a certification requirement, and certification usually precedes settlement. Rules 23(a)(4) and 23(e) are complements, not substitutes; a court applies rule 23(a)(4) before certification to insure procedural fairness and rule 23(e) after settlement to guarantee substantive adequacy.

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41 [D]ue process must mean something other than that the result is just, otherwise some lynchings would be consistent with due process. A 'fairness' hearing that appraises a settlement made outside the court's presence only as to the substantive fairness of the terms provides no more process than would be provided by a post-lynching hearing that assessed whether the dead guy really did commit the crime.

Koniak, *Feasting, supra* note 4, at 1123.

42 See *Corrugated Container*, 643 F.2d at 211 n. 25 ("We hasten to add that the adequacy of settlement terms cannot ordinarily redeem a settlement that was bargained by a party in a conflict position.").

> The court, to be sure, will not approve a settlement if it is unfair, but "fairness" may be found anywhere within a broad range of lower and upper limits. No one can tell whether a compromise found to be "fair" might not have been "fairer" had the negotiating [attorney] possessed better information or been animated by undivided loyalty to the cause of the class. The court can reject a settlement that is inadequate; it cannot undertake the partisan task of bargaining for better terms. The integrity of the negotiating process is, therefore, important.

Haudek, *The Settlement and Approval of Stockholders' Actions — Part II: The Settlement*, 23 SW. L.J. 765, 771-72 (1969), *quoted in In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1125 n. 24 (7th Cir.), *cert. denied*, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 and *cert. denied*, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979).

We apply a mixed standard of review to a district court's determination that a conflict of interest does not exist. The existence of a particular set of circumstances is a factual determination that we review for clear error. Whether those circumstances amount to a conflict of interest is a legal question that we review *de novo*. *FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1311 (5th Cir. 1995) ("we interpret the controlling ethical norms governing professional conduct as we would any other source of law") (quoting *Dresser*, 972 F.2d at 543); see also *Id.* (stating that "we will perform a 'careful examination,' or *de novo* review, of the district court's application of the relevant rules of attorney conduct"). No factual dispute exists in this case, and therefore we must review the district court's decisions *de novo*.

B. CLASS COUNSEL'S FINANCIAL CONFLICT.

Ness Motley represented the class during settlement negotiations despite a financial interest in reaching a settlement that diverged from the class's interest. A divergent financial interest is a paradigmatic conflict of interest, yet the majority refuses to concede that this conflict may have denied the class adequate representation.

The conflict stemmed from Ness Motley's simultaneous representation of both the class and individual plaintiffs who were also suing Fibreboard. While the class settlement negotiations were proceeding, Fibreboard and Ness Motley agreed to settle all of Ness Motley's pre-existing individual lawsuits for a higher-than-average amount. That settlement was partly contingent, however, on Ness Motley and Fibreboard's settling the class claims.

If the class did not settle its claims, Fibreboard would still pay half of the individual plaintiffs' settlement, but they would receive the entire settlement if the class settled.[43] Because Ness Motley represented the indi-

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43 **The individual plaintiffs also would receive the entire settlement if Fibreboard won the coverage case.**

vidual plaintiffs, but not the class, on a contingency basis, it had a financial interest in settling the class claims on any terms whatsoever, even if those terms were unfavorable to the class.

The majority dismisses this conflict by pretending that Ness Motley, the individual plaintiffs, and the class had similar interests in reaching a class settlement. This is simply wrong.

Ness Motley and the individual plaintiffs had a financial interest in seeing the class settle on any terms. In contrast, the class desired a settlement only if it was more lucrative than the alternative — awaiting the outcome of the coverage case. The expected value of that alternative was significant. If the California Supreme Court affirmed the two lower courts that had ruled favorably for the class, the class would enjoy a practically unlimited compensation fund. Accordingly, it is easy to imagine a proposed settlement beneficial to Ness Motley and the individual plaintiffs but unfavorable to the class.

The district court never should have allowed Ness Motley to represent the class. Rule 23(a)(4) simply does not permit an attorney to represent a class if he suffers from a conflict of interest. It does not matter whether Ness Motley negotiated a favorable settlement; rule 23(a)(4)'s concerns are procedural, not substantive. Even if, *arguendo*, the settlement was favorable, an unconflicted attorney might have negotiated a better one. Fibreboard's attorneys knew that Ness Motley had an interest in settling on any terms, and they undoubtedly converted this knowledge into negotiating leverage.

The conflict of interest in this case was direct and egregious. But I would go a step further and prohibit class counsel from ever simultaneously representing individual plaintiffs in cases such as this, as there is too great an opportunity for corruption.

Consider the different fee structures a plaintiffs' attorney faces in class and individual litigation. As class counsel, he will be compensated under the lodestar formula,[44] leaving him no financial stake in the settlement. When representing an individual plaintiff, he will receive a contingency fee, vesting him with a significant financial stake in the outcome of the litigation.

A shrewd but unethical attorney will accept a significantly smaller settlement in a class action in exchange for a more modest increase in an individual settlement. And even an attorney who would refuse such an outright bribe might be tempted to make concessions during the class negotiations, hoping to develop goodwill that will pay dividends when negotiating over the individual lawsuits.

This is not simply a theoretical problem. Consider the *Georgine* case, in which Ness Motley also simultaneously represented the class and individual plaintiffs. While negotiating the class settlement, Ness Motley and the *Georgine* defendants settled the individual claims for a total of about $138 million. Koniak, *Feasting*, *supra* note 4, at 1067. Under the terms of the class settlement, on the other hand, the individual plaintiffs would have been entitled to a maximum of about $90 million. *Id.*

At the least, in *Georgine* Ness Motley treated the individual plaintiffs preferentially. At worst, Ness Motley obtained a concession from the defendants at the expense of the class. In either case, it acted improperly

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44 Under the lodestar formula, a court determines a class attorney's compensation by multiplying the number of hours he has spent on the litigation by an appropriate hourly wage. While the court may determine the hourly wage in part by looking to how favorable a settlement the attorney negotiated, the number of hours the attorney has worked is usually the chief determinant of his total compensation. See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U.CHI. L.Rev. 1, 50 (1991).

and to the detriment of the class, and it is to prevent such behavior that I would prohibit simultaneous representation altogether.[45]

C. *The Conflict Between Extant And Latent Claimants.*

Another conflict of interest arose from the class attorneys' simultaneous representation of both class members with extant claims and those with latent claims.[46] Because they may seek recovery from the settlement fund immediately, extant claimants would profit from high ceilings on recovery or none at all, as there was little danger that the fund would be depleted before it paid their claims. Latent claimants, on the other hand, cannot seek recovery until some triggering event occurs.[47] Because they may be unable to file a claim for a number of years, they would benefit from damage caps low enough to ensure that the settlement fund will not dry up before it pays their claim.

The majority fails to recognize this obvious conflict of interest. In fact, it makes no mention of the Third Circuit's holding in *Georgine* that an impermissible conflict

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45 See Koniak, *supra* note 4, for a more extensive discussion of the perils of simultaneous representation.

46 The majority misleadingly labels these groups as "near" and "far" futures, which suggests that the difference between these groups is simply one of degree. In fact, there is a difference in kind. All of the extant claimants, or "'near' futures," may file claims as soon as approval of the settlement is final. But none of the "'far' futures" may file suit until some triggering event occurs, and they have no way of knowing when, or even whether, that event will occur.

47 State law determines exactly what is the necessary triggering event. Some states permit exposure-only victims to seek recovery, while others require that a claimant develop some illness from his exposure before permitting him to recover. One group of latent claimants, of course, are the future family members of asbestos victims: future spouses and unborn or even unconceived children. For this group, the necessary triggering event is marriage or birth.

of interest occurs whenever extant and latent claimants are represented by the same attorney.[48] *Georgine*'s analysis is worth quoting at length:

> The most salient conflict in this class action is between the presently injured and futures plaintiffs. As rational actors, those who are not yet injured would want reduced current payouts (through caps on compensation awards and limits on the number of claims that can be paid each year). The futures plaintiffs should also be interested in protection against inflation, in not having preset limits on how many cases can be handled, and in limiting the ability of defendant companies to exit the settlement. Moreover, in terms of the structure of the alternative dispute resolution mechanism established by the settlement, they should desire causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993. Finally, because of the difficulty of forecasting what their futures hold, they would probably desire delayed opt out like the one employed in *Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 150 (S.D. Ohio 1992) (heart valve settlement allows claimants who ultimately experience heart valve fracture to reject guaranteed compensation and sue for damages at that time).
>
> In contrast, those who are currently injured would rationally want to maximize current payouts. Furthermore, currently injured plaintiffs

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48 **The majority does distinguish the case before us from *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992), on the ground that certain members of the class in that case had rights under a trust agreement to have their claims paid first, while there is nothing akin to a trust agreement in *Ahearn*. But *Georgine* also lacked anything similar to a trust agreement, so the distinction does not explain the majority's failure to distinguish *Ahearn* from *Georgine*.**

> would care little about inflation-protection. The delayed opt out desired by futures plaintiffs would also be of little interest to the presently injured; indeed, their interests are against such an opt out as the more people locked into the settlement, the more likely it is to survive. *In sum, presently injured class representatives cannot adequately represent the futures plaintiffs' interests and vice versa.*

Georgine, 83 F.3d at 630-31 (emphasis added).

The majority's only explanation for its decision is that the district court's determination that a conflict did not exist was supported by the testimony of the settling parties' expert, Geoffrey Hazard, and the district court's own expert, Eric Green. That explanation is hardly compelling.

The district court's determination that the facts before it did not amount to a conflict of interest was not a finding of fact to which we should defer. Instead, it is a conclusion of law, see *United States Fire Ins. Co.*, 50 F.3d at 1311 (holding that we review *de novo* a district court's application of ethical norms governing attorney conduct), and it is not enough simply to note that two hand-picked law professors — one chosen by the settling parties and the other by the district court — had the same opinion of the law as did that court.

Nor is the reasoning behind the legal opinions of Professors Hazard and Green persuasive. According to the majority, both concluded that a conflict did not exist, essentially because both extant and latent claimants would be better off with a settlement than without one. If that was their reasoning, they asked the wrong question.

Even if there was no conflict between extant and latent claimants as to whether a settlement was a good idea, there was undeniably a conflict between the two groups over the terms of the settlement. It may well

have been appropriate for the same attorneys to represent extant and latent claimants when negotiating with the defendants over the total amount of the settlement. Once the parties agreed to an amount, however, the interests of extant and latent claimants diverged, and they should have been represented by different attorneys for determination of the terms under which the settlement would be distributed to the class.

D. THE CONFLICT BETWEEN PRE- AND POST-1959 VICTIMS.

The global settlement achieved a massive redistribution of wealth. Before the settlement, persons who had been exposed to asbestos before 1959 had far more valuable claims than those who had been exposed after 1959. Fibreboard's insurance policies had expired in 1959, so pre-1959 claimants could seek damages from an insured Fibreboard, with virtually unlimited assets, while post-1959 claimants could only hope to recover from the non-insurance assets of Fibreboard, which amounted to very little. As late as 1993, the settlement value of a pre-1959 claim was three times that of a post-1959 claim.[49] The global settlement, however, eliminated the privileged status of pre-1959 claimants and placed them on equal footing with their post-1959 counterparts.

Because the settlement deprived pre-1959 claimants of a substantial right, they were entitled to separate representation. The majority contends that the class as a whole benefited by sacrificing the special rights of

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49 Fibreboard's pre-1959 claims settled for an average of $12,000 in 1993, while its post-1959 claims settled for only $4,000. See GAF, Fibreboard, *Pfizer Report Decline in Asbestos Cases*, MEALEY'S LITIG. REP., June 2, 1995, at 20. In 1994, the discrepancy almost disappeared, with pre-1959 claims settling for $8,000 and post-1959 claims settling for $7,000. *Id.* As the asbestos world became aware that the expected settlement in *Ahearn* would not differentiate between pre- and post-1959 claimants, the settlement values of those claims naturally moved toward a common figure.

pre-1959 claimants, and I emphatically agree. That is precisely the problem: It was in the best interest of one part of the class to give up something that belonged to another part of the class, and that created a conflict of interest.

Unitary class counsel was bound to consider the interests of the class as a whole, and those interests required giving up the rights of pre-1959 claimants. But the rights of pre-1959 victims were theirs alone, and they were entitled to counsel who would not relinquish those rights unless it was in their own best interest. Only separate counsel, representing pre-1959 claimants alone, could have done so.

Nor am I persuaded by the majority's contention that Fibreboard would never have negotiated separately with pre-1959 claimants and that unitary representation maximized the value of the settlement. So long as the class was negotiating with Fibreboard over the total value of the settlement, there was no need for separate representation, as pre- and post-1959 claimants had the same interest in obtaining as large a settlement as possible. It was only after the parties had agreed on the total amount of the settlement and had begun to bargain over how it should be divided among the class that pre-1959 claimants needed separate representation. There is no reason to suppose this would have any effect on Fibreboard's willingness to make concessions; it was interested only in the total amount of the settlement, not the allocation of the settlement within the class.

VII.
IMPARTIAL JUDGING.

The second due process requirement that the majority fails to enforce is impartial judging. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Thus, a litigant is entitled to try his case before a judge who is free of any personal stake in

the outcome. *Tumey* v. *Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927).

This protection is vitally important in a mandatory class action, for the judge is the only person able to protect class members from an unjust settlement. The class members themselves cannot reject the settlement, and they cannot even reject certification by opting out of the class. They can only present their objections at the fairness hearing and hope the judge will reject the settlement as inadequate. If the judge himself is biased in favor of an unfair settlement, then the class has no protection against it.

The intervenors raise serious questions regarding Chief Judge Parker's ability to conduct an impartial fairness hearing.[50] He had mediated the settlement negotiations, undoubtedly urging the parties to settle on terms he believed to be fair, before the case was even filed. In his lengthy opinion approving the settlement, he referred to his "assistance in the discussions" leading to final agreement. 162 F.R.D. at 516.

Having helped to craft the settlement, Chief Judge Parker had a personal stake in finding it to be fair: A determination that the settlement was unfair would imply that he had acted unfairly in helping to craft it. In light of these facts, a person might reasonably conclude that Chief Judge Parker, despite his dedicated and painstaking efforts, probably developed a natural bias in favor of his own work.[51]

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50 It is well settled that impartiality can reasonably be questioned even where there is no actual bias. See *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988) (*per curiam*).

51 For similar reasons, Congress in 1978 limited the administrative duties of bankruptcy judges. Under the old Bankruptcy Act, bankruptcy judges (then called referees) had been actively involved in the day-to-day affairs of bankruptcy reorganizations. Congress found this objectionable.: "No matter how fair a bankruptcy judge

(*concluded on page A-173*)

The majority concludes that the judge need not have been recused from the fairness hearing, because the settlement negotiations he mediated were a judicial proceeding. I am not so certain. I agree that we are governed by *Liteky* v. *United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), and that if the settlement negotiations were a judicial proceeding, recusal was not required. I also agree that if the negotiations were a judicial proceeding, we must make a case-specific determination: A judge may become so involved in settlement negotiations as to warrant recusal even though the negotiations were judicial proceedings. See *Id.* at ___, 114 S.Ct. at 1157 (noting that recusal may be warranted where bias stems from a judicial source if it amounts to "a deep-seated favoritism or antagonism that would make fair judgment impossible"). As the majority points out, Chief Judge Parker's involvement in this case was not substantial, and recusal is therefore not required unless the settlement negotiations were extrajudicial proceedings.

I part ways with the majority, however, when it comes to deciding whether the settlement negotiations the judge mediated were judicial proceedings. The majority concludes that they were, though its only explanation is to state that "Judge Parker's role in the negotiation process . . . stemmed from three cases filed in his court [i.e., the assignment litigation]." I agree that if the nego-

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(*continued from page A-172*)

is, his statutory duties give him a certain bias in a case, and the bankruptcy court as a result has been viewed by many as an unfair forum." H.R. REP. NO. 595, 95th Cong., 1st Sess. 88 (1978), reprinted in 1978 U.S.C.C.A.N. at 6050. Congress went on to note that "[d]eeper problems arise because of the inconsistency between the judicial and administrative roles of the bankruptcy judges. The inconsistency compromises his impartiality as an arbiter of bankruptcy disputes." *Id.* at 89, reprinted in U.S.C.C.A.N. at 6050. To rectify this problem, Congress limited the role of bankruptcy judges as administrators and mediators. See, e.g., 11 U.S.C. § 341(c) (1994) ("The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors.").

tiations were a legitimate part of the proceedings in the assignment litigation, they were judicial proceedings. Chief Judge Parker's judicial authority was limited to the assignment litigation, however, and I do not believe that he could conduct judicial proceedings with respect to *Ahearn* simply because it was somehow related to the assignment litigation.

Remember that the parties had not even filed *Ahearn* yet. Thus, any time the judge spent mediating that dispute — as opposed to the insurance cases filed in his court — was community service, not judging.[52]

The rules of civil procedure allow judges to participate in settlement conferences. See FED.R.CIV.P. 16(a)(5) (allowing courts to schedule conference "facilitating the settlement of the case"). Rule 16 settlement conferences are judicial proceedings and generally are not an adequate basis for recusal. Cf. *Liteky*, 510 U.S. at ___, 114 S.Ct. at 1157 (noting that judicial proceedings "can only in the rarest circumstances" form an adequate basis for recusal). The question is whether Chief Judge Parker mediated the settlement negotiations in the course of a rule 16 conference.

If the settlement negotiations he mediated were chiefly negotiations over the assignment litigation, and settling *Ahearn* was incidentalto settling the assignment litigation, the negotiations probably amounted to a rule 16 conference. If, on the other hand, the primary object of the negotiations was to settle *Ahearn*, the negotiations do not fall within the bounds of rule 16. That rule allows judges to schedule conferences only to settle "the case," which surely must mean the case filed and pending before the judge. Rule 16 cannot permit a judge to order settlement conferences over cases that are not

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52 **Certainly there can be no criticism of Judge Higginbotham's role. From the start, he served only as a mediator, not a judge. In facilitating agreement, he did precisely what a mediator is supposed to do.**

before him — that would be an exercise of power the Constitution does not permit. See U.S. CONST. art. III, § 2 (limiting judicial power to actual cases or controversies).

> Federal courts are not roving engines of justice careening about the land in search of wrongs to right. Rather, federal courts were designed to be much like all other courts: passive entities resolving only the quarrels which are properly put before them by interested parties and which are within the competence of courts in a tripartite system of constitutional government.

Haitian Refugee Ctr. v. *Civiletti*, 503 F.Supp. 442, 461 (S.D. Fla. 1980), modified, 676 F.2d 1023 (5th Cir. Unit B 1982).

I seriously doubt that Chief Judge Parker was conducting settlement negotiations over the assignment litigation and only incidentally settled *Ahearn* along the way. If so, this is one of the more amazing examples of a tail wagging a dog. I recognize, however, that the content and nature of the settlement negotiations the judge mediated present a question of fact, and I therefore would remand to the district court for findings in this regard.

VIII.
ARTICLE III JUSTICIABILITY.

Finally, the majority simply fails to consider a number of difficult justiciability issues. While questions of Article III standing and variances in state law may seem somewhat rarefied, it is important to remember the central purpose of jurisdictional requirements — to keep us in our place. The constitutionally-assigned task of the federal judiciary is to resolve cases and controversies that Congress and the Constitution have authorized us to adjudicate. When we depart from that role by considering generalized grievances or private dispute resolution mechanisms, we quickly find ourselves acting more as legislative policymakers than as judges.

Failure to honor standing requirements, in particular, can result in devastating consequences for those we intend to help. As standing turns in large part on whether an individual has suffered an injury-in-fact, those who lack standing may be unaware that our legislative dalliances eventually will affect them; thus, they are unlikely to speak up for themselves.

This case presents a particularly egregious example, for the parties and the district court gerrymandered the class to exclude all those who were sufficiently concerned with their injuries to have filed suit. Thus, the class consists largely of people who are unlikely to monitor class counsel's performance or challenge the settlement. In a justice system that depends on robust adversarial presentations, that dynamic leaves the judiciary ill-equipped to evaluate the procedural and substantive fairness of the negotiations and eventual settlement.

This case shatters the constitutional limits placed on the authority of the federal courts by Article III, Section 2 of the United States Constitution. We are obligated to consider these issues, *sua sponte* if necessary, to assure ourselves that the district court properly exercised jurisdiction.[53] It is fairly obvious that here, the district court exceeded its jurisdiction in approving the class action settlement.

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53 The Third Circuit pretermitted the jurisdictional issues raised in a nearly identical case because its decision to decertify the class disposed of the case in favor of the intervenors. See *Georgine* v. *Amchem Prods., Inc.*, 83 F.3d 610, 617, 623 (3d Cir. 1996). Even in that case, one judge wrote separately to emphasize, *inter alia*, that the jurisdictional issues should have been reached. See *Id.* at 635-38 (Wellford, J., concurring). The majority's decision to affirm certification in this case, however, obligates it to address — *sua sponte* if necessary — the troubling jurisdictional problems raised by the district court's approval of the settlement. Nevertheless, the majority has failed even to raise these issues, let alone consider them.

A. THE CAUSES OF ACTION.

The class action complaint alleges only personal causes of action against Fibreboard for money damages.[54] The majority agrees: "The central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos." Maj. Op. at 975 [A-88].[55] The district court also recognized that the complaint alleges *in personam* claims.[56] Thus, *Ahearn* is a case — admittedly an extraordinary one — involving multiple, *in personam*, state-law causes of action aggregated by means of rule 23, the federal class action device.

B. THE BASIS FOR SUBJECT-MATTER JURISDICTION.

The majority does not discuss the basis for subject-matter jurisdiction. The plaintiffs and the defendants, in their joint appellate brief, assert that federal jurisdiction was available under 28 U.S.C. § 1332 (diversity) and 28 U.S.C. § 1335 (interpleader). The district court's published opinion relies on diversity alone as a basis for federal jurisdiction. See *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505, 522 (E.D. Tex. 1995). In supplemental conclusions of law filed on the same day, however, the district court claimed that federal jurisdiction also is proper under the interpleader jurisdiction statute.

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54 The counts alleged are (1) negligent failure to warn; (2) strict product liability; (3) breach of express and implied warranty; (4) concert of action and conspiracy; and (5) "all other viable claims." This last count consists of every "claim or cause of action" that the plaintiffs can assert "against Fibreboard."

55 The majority also states that "*Ahearn* . . . presents us with claims against a healthy company for personal injuries and a proposed settlement of those claims." Maj. op. at 983 [A-104].

56 The district court actually stated that "[the] claims were, prior to the settlement, *in personam* in character." This statement implies that, in the court's view, the settlement transformed the claims into something other than *in personam* claims.

Diversity of citizenship was an arguable basis for subject-matter jurisdiction. Statutory interpleader jurisdiction is not available here, because there is no res or common fund. See *Wausau Ins. Cos.* v. *Gifford*, 954 F.2d 1098, 1100-01 (5th Cir. 1992).[57] Even if interpleader jurisdiction were present, the weighty Article III justiciability issues would still exist.

These Article III issues arise out of the application of *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to this multi-state class action. As in cases brought under the ordinary diversity jurisdiction statute, cases brought under statutory interpleader are governed by state substantive law, pursuant to the mandate of *Erie*. Thus, *Erie* applies to this class action regardless of whether federal jurisdiction is proper under ordinary diversity, interpleader, or both.[58]

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57 In *Wausau*, we were faced with "six insurance funds encompassing different periods during a four-year span." 954 F.2d at 1101. Furthermore, the legitimacy of the claims against each fund was not established. *Id.* Cautioning that "[i]nterpleader is not designed to solve all problems associated with multiparty litigation," *Id.* (citing *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U.S. 523, 535, 87 S.Ct. 1199, 1206, 18 L.Ed.2d 270 (1967)), we held: "Because the present case involves six separate funds and because it is unclear whether there are legitimate claims against each fund, we conclude that an identifiable fund as required for interpleader actions is not involved." *Id.*

In *Ahearn*, we are again faced with multiple funds — the policies issued by the two insurers, Continental and Pacific — and the legitimacy of the liabilities against the policies is not well-established — i.e., the validity of all the class members' claims against Fibreboard has not yet been decided. Moreover, because of the potentially limitless liability under these comprehensive general liability policies, the ultimate scope of coverage cannot be determined until damages are awarded on each successful claim. The terms of the policies in Wausau at least limited coverage to a specific dollar amount; thus, the total possible liability was easily defined. Yet even there we held that interpleader jurisdiction was unavailable. It follows a fortiori from Wausau that such jurisdiction does not exist in *Ahearn*.

58 See *Griffin* v. *McCoach*, 313 U.S. 498, 503, 61 S.Ct. 1023, 1025-26, 85 L.Ed. 1481 (1941) (applying *Erie and Klaxon Co.* v. *Stentor Elec.*

(*concluded on page A-179*)

C. Rule 23(e) Approval And Article III.

Federal Rule of Civil Procedure 23(e),[59] which requires that the dismissal or compromise of a class action be approved by a district court, triggers the inquiry into federal jurisdiction. The act of approving — or disapproving — a class action settlement is an exercise of judicial power by a district court.[60]

(*continued from page A-178*)

Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941) to federal statutory interpleader case); *Perkins State Bank* v. *Connolly*, 632 F.2d 1306, 1311 (5th Cir. 1980) (stating that, with limited exceptions, "substantive state rules of decision generally govern federal interpleader proceedings"); *Bluff Creek Oil Co.* v. *Green*, 257 F.2d 83, 85 (5th Cir. 1958) (applying *Erie* after characterizing § 1335 interpleader action as "just another diversity suit"); *Williams* v. *McFerrin*, 242 F.2d 53, 55 (5th Cir. 1957) (applying Louisiana conflict of laws principles to case, per *Klaxon*, because "interpleader comes under the diversity jurisdiction of the federal courts"); *Whirlpool Corp.* v. *Ritter*, 929 F.2d 1318, 1320-21 (8th Cir. 1991) (stating *in dictum* that *Klaxon* applies to suits brought under § 1335 "because the federal interpleader statute is merely a special brand of diversity jurisdiction") (citing *Griffin*, 313 U.S. at 503, 61 S.Ct. at 1025-26, and *Williams*, 242 F.2d at 55); 7 WRIGHT & MILLER § 1713 (1986) (stating that the Erie doctrine applies fully in both FED.R.CIV.P. 22 and § 1335 interpleader actions) (noting exceptions for certain procedural, remedial, and administrative matters — e.g., pleading rules, the availability of injunctive relief, and attorneys' fees).

59 This provision reads: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED.R.CIV.P. 23(e).

60 *Epstein* v. *MCA, Inc.*, 50 F.3d 644, 667 (9th Cir. 1995), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co.* v. *Epstein*, ___ U.S. ___, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); see *Evans* v. *Jeff D.*, 475 U.S. 717, 726-727, 106 S.Ct. 1531, 1536-1537, 89 L.Ed.2d 747 (1986) (referring to district court's rule 23(e) "power to approve or reject a [class action] settlement"); see also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 793 (3d Cir.) ("A judicially supervised and approved class action settlement, like a judicially supervised trial, is a means of hearing and determining judicially, in other words 'adjudicating,' the value of claims arising

(*concluded on page A-180*)

Unlike a private settlement in an ordinary case, a class action settlement requires that a federal district court affirmatively exercise its adjudicative authority. Thus, a judicially approved federal class action settlement is a "judgment."[61] The underlying authority to enter such a judgment is, of course, expressly circumscribed by Article III, which limits the judicial power to "cases" and "controversies." U.S. CONST. art. III, § 2.

In approving the class action settlement, the district court purported to release — i.e., extinguish — all claims by class members based on Fibreboard's liability for its asbestos products. See *Ahearn*, 162 F.R.D. at 517 (stating that Fibreboard and the insurers would receive "total peace" in return for providing the global settlement monies). Because the court was exercising its Article III judicial power, it did not have the authority to release claims that did not constitute a valid case or controversy at the time it gave its approval.

There are cases either holding or suggesting that in a settlement, courts may release claims that they would lack "jurisdiction" to try. See, e.g., *Adams Extract Co.* v. *Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 221 & nn. 39-40 (5th Cir. 1981);

(*continued from page A-179*)

from a mass tort.") (quoting with approval Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L.REV. 779, 835 (1985) (footnote omitted)), *cert. denied*, ___ U.S. ___, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995).

61 See *Purcell* v. *BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1511 (11th Cir. 1996) (referring to "judgment" approving class action settlement), *White* v. *National Football League*, 836 F.Supp. 1508, 1510-11 (D. Minn. 1993) (describing and entering "judgment" approving class action settlement), *aff'd*, 41 F.3d 402, 406-07 (8th Cir. 1994) (referring to "judgment decree" and "consent judgment" approving class action settlement), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2569, 132 L.Ed.2d 821 and *cert. denied*, ___ U.S. ___, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995); cf. *Matsushita*, ___ U.S. at ___-___, 116 S.Ct. at 877-78 (treating class action settlement approved by state court as a state court judgment).

Epstein v. *MCA, Inc.*, 50 F.3d 644, 661-64 (9th Cir. 1995), *rev'd on other grounds sub nom., Matsushita Elec. Indus. Co.* v. *Epstein*, ___ U.S. ___, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); *Matsushita*, ___ U.S. at ___, ___ - ___, 116 S.Ct. at 877, 879-90. All of these cases, however, refer to dimensions of jurisdiction other than the case-or-controversy requirement. For example, many of them involved federal courts' approving the release of state-law claims, or state courts approving the release of exclusively federal claims. See, e.g., *Corrugated Container*, 643 F.2d at 221 & nn. 39-40; *Epstein*, 50 F.3d at 661-64; *Matsushita*, ___ U.S. at ___, 116 S.Ct. at 877. None of these cases has advanced the radical proposition that a federal court, in approving a class action settlement — i.e., in the exercise of its Article III jurisdiction — can release claims not presenting a case or controversy.

Furthermore, courts often have used the "common nucleus of operative facts" test to determine whether unpled claims can be released. See, e.g., *Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268, 1288 (9th Cir.), *cert. denied*, 506 U.S. 953, 113 S.Ct. 408, 121 L.Ed.2d 333 (1992); *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991). This test is used for determining whether a court may exercise supplemental jurisdiction, and a federal court may exercise supplemental jurisdiction only over claims that are part of the same Article III case or controversy. See 28 U.S.C. § 1367(a) (1994); *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

Thus, the release-of-claims cases assume that the released claims are justiciable cases or controversies. Those cases do not challenge the key conclusion that a portion of a settlement is void if it purports to release non-justiciable claims.

D. THE CLASS.

The plaintiff class of natural persons certified in this case — the Global Health Claimant Class — is indeed

sweeping.[62] By its terms, the class definition includes, *inter alia*, the following categories of persons:

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62 The precise class definition is as follows:

(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;

(b) All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraph (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability).

(1) future children of persons exposed to asbestos ("future children");[63]

(2) future spouses of persons exposed to asbestos ("future spouses");[64] and

(3) persons who have been exposed to asbestos, who have not manifested an asbestos-related disease, and who had not filed or had dismissed a lawsuit by August 27, 1993 ("exposure-only" claimants).

No person included in the first two categories meets the irreducible constitutional minimum of standing for any claim. Furthermore, some of the persons in the third category lack standing with respect to some or all of their claims. Thus, several of the claims asserted by these categories of persons present no justiciable case or controversy, and the district court therefore erred in deciding to hear them.

The future children, for example, include "persons" who had not been conceived at the time the complaint was filed.[65] Common sense alone dictates the conclusion that non-existent persons cannot have standing to assert *in personam* causes of action for money damages. In more formal terms, these unconceived plaintiffs cannot prove injury-in-fact and thus cannot establish

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63 The future children purportedly bring "indirect" claims — e.g., claims for wrongful death — derived from the exposure to asbestos of the persons who will become their parents. Some states treat these claims as non-derivative. See *Adams* v. *U.S. (In re "Agent Orange" Prod. Liab. Litig.)*, 818 F.2d 201, 203 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988). Most of these claims are also unripe because the person exposed to asbestos — the future parent of the future child — is still alive.

64 The future spouses also purportedly bring indirect claims — e.g., loss of consortium. Again, some jurisdictions treat these claims as non-derivative. See *Adams*, 818 F.2d at 203.

65 For simplicity, I restrict my analysis to persons not yet conceived.

standing to assert their *in personam* tort claims. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (defining injury-in-fact).

Similarly, future spouses — who may or may not already be born — are, by definition, not yet married to the exposed persons. Common sense once again dictates the conclusion that these persons — who have not been exposed to asbestos themselves — have not yet been injured in fact because they currently have no relation to exposed persons.

Imagine, for example, the absurd hypothetical of a "person" from each of the first two categories filing individual lawsuits today in federal court — i.e., without resort to rule 23. I do not doubt that any federal court would dismiss their claims immediately for want of justiciability. We must not allow the aggregation of individual claims through the class action device to divert our attention from such a fatal defect.[66]

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66 The rule 23(b)(3) class in the *Agent Orange* case was carefully defined to avoid future children and future spouses. The class definition read as follows:

> [T]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . . . The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Ivy v. *Diamond Shamrock Chems. Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 996 F.2d 1425, 1429 (2d Cir. 1993) (quoting *In re "Agent Orange" Prod. Liab. Litig. MDL No. 381*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988)), *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1125, 127 L.Ed.2d 434 and *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1126, 127 L.Ed.2d 434 (1994). This definition restricted the class to past and present spouses and already-born children, thus avoiding the jurisdictional anomalies presented by future spouses and future children.

(*concluded on page A-185*)

Aside from these glaring defects, a more subtle problem exists with respect to the third category of persons that I defined above — i.e., the exposure-only claimants. Properly addressing the problem, however, requires a review of certain fundamental principles of Article III jurisdiction and their application to diversity cases.

E. STANDING.

1. Standing in Relation to Causes of Action.

It is impossible to analyze standing without reference to a cause of action: "[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents."[67] Suppose, for example, that a public

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(*continued from page A-184*)

The appellees would have us believe that the federal courts routinely certify classes including future claimants; the authorities they cite belie that claim, however. In *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 393, 100 S.Ct. 1202, 1207, 63 L.Ed.2d 479 (1980), the class definition did include future claimants, but the district court had declined to certify the class; as a result, the Court never had occasion to consider the standing issues raised by the inclusion of such persons. Likewise, the district court in *Comer* v. *Cisneros*, 37 F.3d 775, 780, 796 (2d Cir. 1994), had declined to certify a class including future claimants. Thus, the holding in *Comer* was merely that the purported class representatives — who were present claimants — had standing, not that the future claimants did.

Finally, *McArthur* v. *Scott*, 113 U.S. 340, 5 S.Ct. 652, 28 L.Ed. 1015 (1885), simply has nothing to do with this mass toxic tort class action. The portion of *McArthur* relied upon by the appellees discusses trusts and estates, as do the cases cited therein. See *Id.* at 401-02, 5 S.Ct. at 673-74.

67 *International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77, 111 S.Ct. 1700, 1704, 114 L.Ed.2d 134 (1991); see *Catholic Social Serv.* v. *Shalala*, 12 F.3d 1123, 1125 (D.C. Cir. 1994) ("[A] plaintiff's standing must be analyzed with reference to the particular claim made."); see also *Financial Insts. Retirement Fund* v. *Office of Thrift Supervision*, 964 F.2d 142, 146 (2d Cir. 1992) (quoting *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704).

(*concluded on page A-186*)

employer has discriminated against an applicant for employment on the basis of race. Undoubtedly, such an allegation of injury would meet Article III's standing requirements for, e.g., a Fourteenth Amendment equal protection claim.

Nevertheless, that injury may not serve as the predicate for standing to assert any conceivable cause of action. For example, such an injury does not operate to confer standing on the applicant for a violation of the right to be free from unreasonable searches and seizures under the Fourth Amendment. For while he could show injury-in-fact with respect to his equal protection rights, he cannot show injury-in-fact with respect to his rights under the Fourth Amendment. See *Lewis* v. *Casey*, ___ U.S. ___, ___ n. 6, 116 S.Ct. 2174, 2181-82 n. 6, 135 L.Ed.2d 606 (1996).[68]

(*continued from page A-185*)

In *Louisiana Landmarks Soc'y* v. *City of New Orleans*, 85 F.3d 1119, 1122 n. 3 (5th Cir. 1996), we stated that "[s]tanding is a concept distinct from the concept of private rights of action." The appellee in that case had failed to brief the implied cause of action issue raised by the appellants, asserting that the appellants had waived a "standing" argument in the district court. We expressed our puzzlement with the appellee's waiver argument by noting that standing and implied rights of action are not equivalent concepts and that, moreover, standing can never be waived, because it is jurisdictional. See *Id.* Thus, *Landmarks* should not be read as implying that standing is unrelated to the causes of action alleged.

68 The Court made this point explicitly:

> [S]tanding is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law. As we have said, "[n]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum* v. *Yaretsky*, 457 U.S. 991, 999, 102 S.Ct. 2777, 2783, 73 L.Ed.2d 534 (1982).

Casey, ___ U.S. at ___ n. 6, 116 S.Ct. at 2181-82 n. 6 (parallel citations omitted).

Thus, standing analysis assumes, at a minimum, that the plaintiff has alleged a cause of action created to vindicate a legally protected interest. The cause of action alleged serves as a necessary frame of reference for the standing inquiry — hence the Court's explicit connection of standing and causes of action in *International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991):

> Standing does not refer simply to a party's capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents. "Typically, . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.*"[69]

In other words, standing analysis does not operate in a vacuum: The allegation of a cause of action frames the inquiry. See *Catholic Social Serv.* v. *Shalala*, 12 F.3d 1123, 1125 (D.C. Cir. 1994).[70]

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69 500 U.S. at 77, 111 S.Ct. at 1704 (quoting *Allen* v. *Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984)) (emphasis in original); see *Catholic Social Serv.*, 12 F.3d at 1125; *Howe* v. *Ellenbecker*, 8 F.3d 1258, 1261 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1373, 128 L.Ed.2d 49 (1994); Financial Insts., 964 F.2d at 146-47; see also *United Food & Commercial Workers Int'l Union, Local 751* v. *Brown Group, Inc.*, 50 F.3d 1426, 1428-29 (8th Cir. 1995), *rev'd on other grounds*, ___ U.S. ___, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996); cf. *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508, 1514 (9th Cir. 1992) ("Where . . . Congress is the source of the purportedly violated legal obligation, we look to the statute to define the injury.") (quoting *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704).

70 I do not suggest that we look to the merits of the cause of action or determine whether the cause of action is valid (in the sense of determining whether the plaintiff ultimately would win). Rather, we must examine the pleadings to determine what cause of action the plaintiff has alleged and whether his allegations of injury, in the context of that cause of action, satisfy Article III standards.

In diversity cases, pursuant to the *Erie* doctrine, state law defines the substantive causes of action. In an ordinary case, we rarely have to confront the interaction between *Erie* and federal standing analysis. Regardless of what else one can say about *Ahearn*, however, no one can fairly accuse it of being an ordinary case.

2. Injury-in-Fact.

In *Lujan* v. *Defenders of Wildlife*, the Supreme Court set out the test for Article III standing as follows:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural or hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

504 U.S. at 560-61, 112 S.Ct. at 2136 (footnote and citations omitted). For the purposes of this case, we need focus only on the first prong of this standard: injury-in-fact.

The *Lujan* injury-in-fact test consists of two sections:

(1) the "invasion of a legally protected interest"; and

(2) the criteria of

  (a) concreteness and particularity; and

  (b) actuality or imminence.

The failure of a plaintiff fully to meet the requirements of both sections constitutes the failure to establish the irreducible constitutional minimum of standing.

Thus, to survive the Article III inquiry, a plaintiff must make — *inter alia* — a showing that he had a legally protected interest that has been invaded. The failure to make such showing would be fatal to his attempt to establish Article III standing.

3. Effect of State Law.

The second part of the *Lujan* injury-in-fact test is governed purely by federal law (even in diversity cases), for no pronouncement of state law can affect a federal court's determination of whether an invasion of a legally protected interest is, e.g., sufficiently concrete and particularized to satisfy Article III. Similarly, no decision of state law can affect a federal court's determination of whether such an invasion is sufficiently actual or imminent to satisfy Article III.

In diversity cases, however, the first part of the *Lujan* injury-in-fact test is not completely independent of state law. The concept of "invasion of a legally protected interest" immediately invites the question of who or what protects the interest. In an ordinary, non-diversity case, federal law is the source of substantive rights and of causes of action designed to vindicate those rights. In diversity cases, it is state law that creates legally protected interests and provides causes of action to vindicate them.

This conclusion cannot be avoided by chanting the mantra that federal law cannot depend on state law. Under *Erie*, the judgment of a federal court depends on state substantive law in a diversity case. The definition of a legally protected interest — as well as the provision of a cause of action to vindicate that interest — is

a matter of substantive law.[71] If the federal injury-in-fact test articulated in *Lujan* depends on the definition of a legally protected interest — and it does — then the outcome of that federal inquiry depends in part on how state law defines that interest.

Moreover, when a state has declined to create a given cause of action, it has decided not to accord legal protection to a particular interest. Therefore, if a given exposure-only cause of action embraced in the settlement is not founded on a substantive right,[72] it is impossible for a person asserting that claim to prove injury-in-fact. This is so because the injury-in-fact test requires proof of the invasion of a legally protected interest. See *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136; cf. *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704

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71 In a recent case interpreting the Warsaw Convention, the Supreme Court had occasion to consider whether the question of who may bring suit is substantive or procedural. See *Zicherman* v. *Korean Air Lines Co.*, __ U.S. __, __, 116 S.Ct. 629, 634, 133 L.Ed.2d 596 (1996). The Court was interpreting Article 24 of the Convention, which leaves to domestic law the issues of who is entitled to sue and what types of damages they may recover. See *Id.* at __ - __, 116 S.Ct. at 633-34. The Court concluded:

> The most natural reading of [Article 24] is that, in an action brought under Article 17, the law of the Convention does not affect the *substantive* questions of who may bring suit and what they may be compensated for . . . . It does not seem to us that the question of who is entitled to a damages award is procedural.

Id. at __, 116 S.Ct. at 634 (emphasis added). Thus, the question of who may bring suit is a question answered by substantive law — in a diversity case, state substantive law. This is not to say that standing in federal court is purely an issue of state law in a diversity case; rather, the role of state law is to identify, within federal constitutional limits, the persons who have legally protected interests and what those interests are.

72 This is equivalent to saying that the law of the relevant state (determined through a choice of law analysis) does not authorize that exposure-only cause of action.

(stating that substantive claim is a predicate for standing analysis).[73]

4. Choice of Law Analysis.

The causes of action alleged in *Ahearn* are state-law causes of action brought on the basis of diversity jurisdiction. Standing must be measured by the cause of action pled, see *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704; therefore, the standing of the exposure-only plaintiffs must be gauged by the causes of action they assert.

All of the exposure-only claimants have a common predicate for their causes of action: Their claims, by definition, are based on mere exposure to asbestos, not on an extant injury caused by exposure to asbestos. The states vary, however, in the degree to which they

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73 Cases that opine in broad language that state law cannot affect the diversity jurisdiction of the federal courts are inapposite. Cf., e.g., *Begay* v. *Kerr-McGee Corp.*, 682 F.2d 1311, 1315 (9th Cir. 1982). In *Begay*, the court did opine that state law cannot create or enlarge federal jurisdiction, but that statement must be viewed in context.

The *Begay* court faced a state statute that granted a substantive right and then purported to state that the sole remedy for violation of the right was an administrative claim over which a state commission had exclusive jurisdiction. The court responded that a state law, having conferred a substantive right, cannot determine whether a federal court sitting in diversity has jurisdiction over a claim based on that right. See *Id.* at 1315-17. Rather, the proper inquiry in such a case is whether the complaint stated a claim upon which relief could be granted. See *Id.* at 1315, 1317, 1320.

This analysis does not apply to the Article III justiciability issues raised in *Ahearn*. The existence *vel non* of a cause of action is a factor that the Supreme Court has incorporated into the Article III standing inquiry. See *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136. Reinforcing this approach is the unambiguous recognition by the Court that we are to measure standing according to the particular common-law, statutory, or constitutional claim asserted. See *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704. Thus, in diversity cases, whether a state-law cause of action exists at all is a jurisdictional issue insofar as it relates to standing and injury-in-fact, not an issue of whether a claim for relief has been stated.

recognize a cause of action predicated on exposure alone — i.e., they vary in the degree to which they legally protect an interest in being free from exposure to asbestos.

In Pennsylvania, for example, "asymptomatic pleural thickening is not a compensable injury which gives rise to a cause of action." *Simmons* v. *Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232, 237 (1996). Pennsylvania does not recognize, in the absence of manifest injury, a legally protected interest either in (1) being free from the increased risk of cancer because of exposure to asbestos or in (2) being free from present emotional distress resulting from exposure to asbestos (i.e., distress caused by the fear of contracting cancer). See *Id.* 674 A.2d at 237-38.[74] Consequently, because Pennsylvania does not legally protect those interests, a plaintiff

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74 Despite this unambiguous holding, the Supreme Court of Pennsylvania has allowed plaintiffs to recover medical monitoring costs for exposure to asbestos. See *Simmons*, 674 A.2d at 239-40. The court stated that such costs were properly awarded for meritorious exposure-only cases but that damages for increased risk and fear of cancer were not authorized. See *Id.* 674 A.2d at 239-40.

There are two ways to analyze the phenomenon of exposure-only causes of action. First is the monolithic view — i.e., that there is only a single cause of action based on exposure to asbestos, for which there are multiple remedies (some of which may not be available). Second is the "polylithic" view (for lack of a better word), that there are multiple causes of action for exposure to asbestos (some of which may not be available) — i.e., there is one cause of action for increased risk of cancer, one cause of action for medical monitoring costs, etc.

It is largely irrelevant which of these two models is more elegant from a conceptual standpoint. What is important — indeed, determinative — for our inquiry is which of the two each state has adopted. Pennsylvania's high court unambiguously has held that Pennsylvania law supports no cause of action for increased risk of cancer or for present emotional distress arising from the fear of cancer. Thus, the court's statement about medical monitoring damages is best viewed as the authorization of a distinct cause of action for medical monitoring expenses. Reading the opinion otherwise would defy its plain language regarding Pennsylvania's nonrecognition of increased risk and emotional distress causes of action.

asserting such causes of action could not possibly establish injury-in-fact under the standing test announced in *Lujan* — i.e., he cannot demonstrate the invasion of a legally protected interest.

States other than Pennsylvania also have declined to recognize all of the exposure-only causes of action embraced in the instant global settlement.[75] Such unauthorized claims are not founded upon legally protected interests. Thus, because those claims cannot properly be before an Article III court, they cannot be extinguished by the *Ahearn* global settlement. Therefore, because the global settlement purports to extinguish those claims, reversal or vacatur is required.

It was necessary to conduct a choice of law analysis to determine the answer to the threshold question of standing in this case. More specifically, the district court should have conducted the choice of law analysis to determine whether every class member alleged the invasion of a legally protected interest — per the *Lujan* injury-in-fact test — with respect to each claim they asserted. The failure to do so resulted in the district court's exercising its powers over claims not presenting

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75 See, e.g., *Burns* v. *Jaquays Mining Corp.*, 156 Ariz. 375, 752 P.2d 28, 29-31 (Ct.App. 1987) (holding that subclinical asbestos-related injury is not sufficient to support cause of action), review dismissed, 162 Ariz. 186, 781 P.2d 1373 (1989); *DeStories* v. *City of Phoenix*, 154 Ariz. 604, 744 P.2d 705, 707-11 (Ct.App. 1987) (same); *Mergenthaler* v. *Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984) (holding that present physical injury caused by exposure to asbestos is "essential element" of claims for mental anguish and medical monitoring costs); *Capital Holding Corp.* v. *Bailey*, 873 S.W.2d 187, 192 (Ky. 1994) (requiring manifestation of asbestos-caused injury before recognizing existence of cause of action for negligence based on exposure to asbestos); *Larson* v. *Johns-Manville Sales Corp.*, 427 Mich. 301, 399 N.W.2d 1, 2 (1986) (holding that cause of action for asbestosis accrues upon discovery of disease, not at time of exposure to asbestos); *Locke* v. *Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900, 904-06 (1981) (holding that injury does not occur upon exposure to asbestos, but rather upon development of disease).

a case or controversy — i.e., in the absence of Article III jurisdiction.[76]

F. ERIE, DIVERSITY, AND ARTICLE III.

The majority's failure to raise and address the Article III issues is directly contrary to *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), and

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76 The appellees cite a legion of cases indiscriminately — and in most cases without sufficient analysis — for the proposition that the exposure-only claims present a case or controversy. These cases, for one reason or another, are insufficient to overcome the force of *Lujan* and *International Primate*.

For example, the appellees cite *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), as an example of a case where the Supreme Court found exposure to a harmful substance a sufficient injury-in-fact for standing purposes. The plaintiffs sought a declaratory judgment that a federal statute capping liability for nuclear accidents had violated their constitutional rights. See *Id.* at 67, 98 S.Ct. at 2627. Three justices wrote separate concurrences expressing their conclusions that the dispute in that case was not within the district court's jurisdiction. See *Id.* at 94-103, 98 S.Ct. at 2641-46 (concurring opinions of Justice Stewart, then-Justice Rehnquist, and Justice Stevens). The majority's standing analysis appeared to focus on environmental and aesthetic injuries unconnected to the claims asserted by the plaintiffs, which were claims for violations of the Due Process and Takings Clauses of the Fifth Amendment. Compare *Id.* at 69, 98 S.Ct. at 2628 (claims alleged in complaint) with *Id.* at 72-74, 98 S.Ct. at 2629-31 (injuries alleged in complaint).

That methodology — analyzing injury unanchored by the substantive claim asserted — is no longer available to us in light of *Lujan* and *International Primate*. In fact, the analysis advanced by the *Duke Power* majority is logically inconsistent with the Supreme Court's modern standing framework, embodied primarily in *Lujan* and enhanced by the unanimous directive in *International Primate*. Given that irreconcilable inconsistency, we have no choice but to follow the Court's more recent pronouncements.

Helling v. *McKinney*, 509 U.S. 25, 28, 113 S.Ct. 2475, 2478, 125 L.Ed.2d 22 (1993) — a case not cited by the appellees — is not on point, because the plaintiff alleged present injuries based on exposure to an alleged toxin (second-hand tobacco smoke). See also *Georgine*, 83 F.3d at 636 (Wellford, J., concurring). As a result, the Supreme Court never reached the issue of standing based on mere exposure to a toxin.

(*concluded on page A-195*)

Angel v. *Bullington*, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947). In *Guaranty Trust*, the Court faced the question of whether a state statute of limitations barring a class action was to be applied by a federal court sitting in diversity. See *Guaranty Trust*, 326 U.S. at 100-01, 65 S.Ct. at 1465-66. The Court expressly stated that *Erie* implicates the jurisdiction of Article III courts: "Our starting

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(*continued from page A-194*)

In *Agent Orange*, the Second Circuit did not mention either *Lujan* or International Primate in stating that the exposure-only plaintiffs had sustained an "'injury in fact.'" See *Agent Orange*, 996 F.2d at 1434 (relying only on *Duke Power*). Although I admire the Second Circuit's handling of the massive *Agent Orange* litigation, I must respectfully disagree with its analysis that exposure-only claimants in that litigation met Article III's requirements. Other than *Duke Power*, the court appeared to rely only on cases involving the interpretation of the term "injury" in insurance policies. See *Id.* These cases, however, are not authoritative with respect to the manner in which "injury-in-fact" is defined for Article III purposes. But see *Id.* The Supreme Court's recent guidance in *Lujan*, on the other hand, is dispositive of that definitional issue. The appellees cite several bankruptcy cases to support their exposure-only theory — e.g., *In re UNR Indus.*, 20 F.3d 766, 770-71 (7th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 509, 130 L.Ed.2d 416 (1994); *Findley* v. *Blinken (In re Joint E. & S. Dist. Asbestos Litig.)*, 129 B.R. 710, 834-37 (E. & S.D.N.Y. and Bankr. S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); *Lindsey* v. *Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926))*, No. CV 92-P-10000-S, Civ.A. No. CV94-P-11558-S, 1994 WL 114580, at *1 (N.D. Ala. Apr. 1, 1994). On its face Article III does not apply to bankruptcy courts, which are Article I courts. See *Rohm & Hass Texas, Inc.* v. *Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 210 n.18 (5th Cir. 1994). Because of the statutory scheme requiring that matters be referred to bankruptcy courts by district courts, however, the jurisdiction of the bankruptcy courts may be limited by Article III. See, e.g., *In re Interpictures, Inc.*, 86 B.R. 24, 28-29 (Bankr. E.D.N.Y. 1988); John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 NW.U. L.Rev. 1188, 1197-98 (1988).

If Article III does not apply to bankruptcy courts, the cited cases are plainly distinguishable. If it does apply, the reasoning of those cases is erroneous. The two district court cases do not cite to *Lujan* or *International Primate*. The Seventh Circuit's decision in *UNR* does cite to the former, but only in a conclusionary fashion and without any in-depth analysis.

point must be the policy of federal jurisdiction which *Erie R. Co.* v. *Tompkins* embodies." *Id.* at 101, 65 S.Ct. at 1466 (citation omitted).

Recognizing that the *Erie* doctrine "[i]nevitably" applies to suits in equity, the Court framed the issue presented as follows:

> Is the outlawry, according to State law, of a claim created by the States a matter of "substantive rights" to be respected by a federal court of equity *when that court's jurisdiction is dependent on the fact that there is a State-created right*, or is such statute of "a mere remedial character" which a federal court may disregard?

Id. at 107-08, 65 S.Ct. at 1469 (citation omitted) (emphasis added). Thus, the Court explicitly recognized that the viability of a state-law cause of action was an essential predicate of diversity jurisdiction.

The Court's holding in Guaranty Trust was unambiguous:

> Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.

Id. at 110, 65 S.Ct. at 1470. Thus, a state's decision to limit the life of a state-created cause of action must be respected by federal courts sitting in diversity. It is equally plain — indeed, it follows *a fortiori* — that when a state has declined to give life to a cause of action at all, federal courts sitting in diversity also must refuse to entertain that cause of action.

In fact, we have interpreted a decision of the Supreme Court as specifically stating that federal courts sitting in diversity must not entertain diversity actions that are

unavailable under state law. See *Kuchenig* v. *California Co.*, 350 F.2d 551, 556 (5th Cir. 1965) (interpreting *Angel*), *cert. denied*, 382 U.S. 985, 86 S.Ct. 561, 15 L.Ed.2d 473 (1966). In deciding whether indispensability of a party was a matter governed by state or federal law in a diversity case, we applied an analysis in *Kuchenig* that closely parallels appropriate the *Erie* /standing analysis in *Ahearn*.

We first noted that "every court that has dealt with th[at] issue at all seems to have treated it, appropriately in our view, as a run-of-the-mine [*sic*] *Erie* problem, requiring the usual balancing of substantive and procedural elements." *Kuchenig*, 350 F.2d at 555. We stated further:

> [I]ndispensability, while not properly regarded as a jurisdictional issue, is closely related to jurisdiction, *and may act to defeat diversity jurisdiction* . . . . [R]ules of joinder depend on the substantive rights and liabilities of the parties, present and absent. In diversity actions, these substantive rights and liabilities are creatures of state law.

Id. at 555-56 (footnotes and citations omitted, emphasis added). We thus recognized an inevitable relationship, in diversity cases, between state substantive law and federal jurisdiction. We also noted that this relationship was not confrontational, but symbiotic: "Professor [Charles Alan] Wright characterizes the conflict in these cases as 'more apparent than real': state law determines the interests of the parties; federal law determines whether these state-created rights render a missing person indispensable." *Id.* at 556.[77]

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77 **Critically, we modified Professor Wright's apparent conflict formulation in one critical respect: "This short-hand formulation must at least be qualified insofar as it leaves room for a federal court**

(*concluded on page A-198*)

This approach to indispensability of a party — a matter "closely related to jurisdiction" that "may act to defeat diversity jurisdiction," *Id.* at 555 — parallels the approach I have applied above in relation to standing. State law determines the substantive rights and interests of the exposure-only claimants. When a state has conferred a substantive right, federal law determines whether persons asserting such a right meet Article III requirements.

When a state has not conferred such a right, it is not within the power of a federal court to entertain that action in diversity. See *Id.* at 556. The district court's diversity jurisdiction in this multi-state class action depended on the existence of state-created causes of action. See *Guaranty Trust*, 326 U.S. at 107-08, 65 S.Ct. at 1469 (stating that a federal court's diversity jurisdiction is "dependent on the fact that there is a State-created right"). In order to determine whether it had jurisdiction over all of the claims released in the class action settlement, the district court had to conduct a choice of law inquiry to determine which states' laws applied to which causes of action. Any claims not authorized by state law should have been explicitly excised from the settlement. The adjudication by the district court of those claims violated Article III limits on that court's jurisdiction.

Under these circumstances, we have no discretion: We must reverse or vacate the judgment approving the

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(*continued from page A-197*)

to run afoul of *Angel* v. *Bullington* by entertaining diversity actions unavailable under state law." *Id.* (citation omitted). Professor Wright had acknowledged this limitation, referring to a prominent district judge's articulation of it: "'Judge Wyzanski carefully points out the limitation that if, as a matter of substantive law, a state does not recognize that a plaintiff has a particular right of action unless he joins with him certain others, then the federal court in a diversity action is precluded from giving a plaintiff who fails to join those others an opportunity to proceed as though alone he had a substantive right.'" *Id.* (quoting 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 511 (1964 pocket part) (Wright ed. 1961)).

class action settlement. In reviewing the approval of a class action settlement, we may not modify the terms of the settlement but must approve or disapprove it in its entirety. *Cotton* v. *Hinton*, 559 F.2d 1326, 1331-32 (5th Cir. 1977).

The reason for this rule is straightforward: Class action settlements often include delicate compromises, the disruption of which would lead one or more of the parties to reconsider the wisdom of the settlement. Therefore, if an appellate court negates part of a class action settlement — e.g., because of justiciability problems — it would have to vacate or reverse and remand for further proceedings. It could not simply excise the objectionable portion of the settlement and uphold the remainder as a viable settlement. See *Id.*

IX.
SUMMARY AND CONCLUSION.

Unencumbered by legislative safeguards and shedding nearly every judicial protection, the district court enacted a novel, untested tort reform package. As a result, Fibreboard's victims find themselves guinea pigs in a dubious (and legally unfounded) experiment.

The only protection accorded the class was a rule 23(e) fairness hearing. The district court also appointed a guardian ad litem to represent absent class members, but he did so only after class and defense counsel had completed the settlement. Thus, class members received absolutely no structural or procedural protections; instead, they had to rely on an after-the-fact review of the settlement's substance.

The district court and the guardian ad litem undertook that task diligently, but an after-the-fact substantive review is far too little, far too late. The court cannot conduct a trial in order to avoid one; nor can it turn back the clock and appoint different counsel to renegotiate the settlement fairly. Thus, the extent to

which class counsel's numerous conflicts and Fibreboard's stacking of the deck actually affected the final settlement is unknowable. As Fibreboard entered the negotiations in constructive bankruptcy and left with more than ninety-five percent of its assets intact, however, there is reason to be skeptical.

The effect of replacing the tort system with an administrative processing center is equally hard to ascertain, for judges lack legislative fact-finding and investigative capabilities. If the trust proves to be funded adequately and managed fairly, it might process claims more efficiently than the courts, reducing transaction costs and providing plaintiffs with faster and more reliable recovery. As such a reduction in transaction costs would generate a surplus for Fibreboard and the class, Fibreboard might deserve to walk away with over $200 million in remaining assets.

On the other hand, the trust might attempt to impose arbitrary limits similar to those of the *Georgine* trust and stonewall plaintiffs' counsel who protest, forcing them to endure a tedious series of procedural delays before their clients finally receive a day in court. The trust might also be inadequately funded, as was the Dow Corning settlement, leaving plaintiffs scraping for what little they can get while bureaucrats struggle to hold on to their jobs.

In short, we simply do not know what the courts have wrought. What we do know is that this "reform" involves denial of established constitutional rights; relaxation of already lax ethical rules; extinguishing of claims that we have no power to adjudicate, much less abolish; and a significant likelihood of collusion between the defendant and the class counsel.

I respectfully dissent from the majority's refusal to reverse — or veto — certification of this no-opt-out, mass-tort, settlement-only, futures-only class action.

MEMORANDUM OPINION
[CITE AS: 162 F.R.D. 505]

(United States District Court —
E.D. Texas, Tyler Division)

(Filed July 27, 1995)

(Gerald AHEARN, James Dennis, Charles W. Jeep, James Ellison and William James Mitchell, on Behalf of Themselves and Others Similarly Situated, Plaintiffs, v. FIBREBOARD CORPORATION and Bethlehem Steel Corporation, Defendants, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company, Defendant-Intervenors. Owens-Illinois, Inc. on Behalf of Itself and Others Similarly Situated, Additional Counterclaim Defendant; Civ. A. No. 6:93cv526)

ROBERT M. PARKER, Circuit Judge.

This action was filed to obtain judicial approval of a class settlement (the "Global Settlement") which, if finally approved, will resolve all future[1] asbestos-related personal injury claims against Fibreboard Corporation ("Fibreboard"), and a longstanding dispute between Fibreboard and two of its insurers, Continental Casualty Company ("Continental") and Pacific Indemnity Company ("Pacific") (Continental and Pacific are sometimes referred to collectively as the "Insurers") regarding the scope and extent of its insurance coverage available to Fibreboard to cover its asbestos liabilities. The agree-

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[1] **Throughout this opinion, a "future claim" means a claim by a Global Health Claimant Class member covered by the Global Settlement Agreement. The Global Health Claimant Class essentially consists of all persons having a claim arising out of exposure to asbestos or asbestos-containing products for which Fibreboard may bear legal liability, where that exposure occurred prior to August 27, 1993, and where the claim had not been filed as a lawsuit or settled as of August 27, 1993. The precise class definition is set out in detail in the Judgment Regarding Class Certification.**

ments now before the Court for approval reflect a settlement among parties who have aggressively asserted and controverted the rights and claims that will be finally compromised and settled if the Court enters a final judgment. The principal parties to this litigation are the following: Gerald Ahearn, James Dennis, Charles W. Jeep, James Ellison and William James Mitchell, the class representatives of the plaintiff and defendant asbestos health claimant classes in this action (the "Global Health Claimant Class," or the "Class"); Fibreboard, which manufactured and distributed asbestos-containing products, principally asbestos insulation, from the 1920s until 1971; Continental, CNA Casualty Company of California and Columbia Casualty Company, which issued general liability policies to Fibreboard; Pacific, which Fibreboard alleges issued it a general liability policy; Owens-Illinois, Inc. ("Owens-Illinois"), the class representative of a defendant class of third-party claimants (the "Global Third-Party Claimant Class"); Bethlehem Steel Corporation ("Bethlehem"), the class representative of a defendant class of certain employers and insurers (the "Longshore Defendant Class"); Esteban Yanez Ortiz, Marion Behee, Paul Cochran, Edee Cochran, Ida Beck, John R. Allgood, Henry Evers and Lester E. Taylor (the "Ortiz Intervenors"), intervenors represented by the law firm of Baron & Budd, who have objected to this settlement; and James Flanagan and David H. Middleton (the "Flanagan Intervenors"), intervenors represented by the Maritime Asbestos Legal Clinic, a Division of the Jaques Admiralty Law Firm, who have objected to this settlement.

OVERVIEW

This action is the latest installment in the continuing saga of asbestos-related personal injury litigation against Fibreboard. If the Global Settlement is finally approved, it will be the last.

The parties to the Global Settlement (the "Settling Parties") agreed to the settlement because each found

the Global Settlement preferable to the alternatives. Under the Global Settlement, Fibreboard will survive with its assets intact; the Global Health Claimant Class members will be better compensated than if Fibreboard were bled dry in the tort system; and the Insurers will rid themselves once and for all of a potentially ruinous liability. The only real loser under the Global Settlement is the asbestos litigation industry — the army of lawyers, consultants, and experts of every stripe — which has historically consumed the lion's share of the funds expended by asbestos defendants and their insurers in dealing with their asbestos liabilities.[2]

Without the Global Settlement, Fibreboard's chances of survival range from fair to nil, depending on the outcome of its insurance dispute. All Global Health Claimant Class Members, but especially those whose claims mature far in the future and those who were first exposed to Fibreboard's asbestos-containing products after 1959, face a serious risk of receiving little or no compensation from Fibreboard without the settlement.

The prerequisites of Rule 23(a) have been met. Mandatory class treatment is proper under the plain language of Rule 23(b)(1)(B). The only real obstacle the Global Settlement faces is its relative novelty. It remains to be seen whether Rule 23 will finally be determined to be flexible enough to embrace such a case. Put another way, the primary question presented by this case is whether the courts can provide a forum wherein a business plagued with continuing mass tort liability can negotiate a fair and final resolution the problem, or

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[2] The Asbestos Litigation Industry was not without a voice in these proceedings. The Jaques firm, which represents the Flanagan Intervenors, purports to have an inventory of thousands of unfiled claims which allegedly would be affected by approval of the Global Settlement to the detriment of the firm. One of that firm's primary objections to the Global Settlement is that it would limit attorneys' fees to 25% of a claimant's recovery under the Global Settlement rather than a higher contractual contingent fee.

whether the courts' competence is limited to parceling out the corpse in bankruptcy.

BACKGROUND AND SETTLEMENT NEGOTIATIONS

A. Asbestos Litigation Generally

Asbestos-related personal injury and wrongful death litigation began in the courts of East Texas in the late 1960s. The first modern-day asbestos-related personal injury case in this country was brought in this Court in 1967 by Claude Tomplait against Fibreboard and other defendants. Through the late 1970s, plaintiffs' counsel around the country crafted theories of liability against the asbestos defendants they had identified. Plaintiffs' counsel conducted discovery, assembled a mass of documents bearing on liability that are now well known to every experienced asbestos judge, and identified the various medical conditions that could be forensically attributed to asbestos exposure. By the mid-1980s, the fundamental legal theories and liability cases against the early defendants, including Fibreboard, had been established, and litigation against these companies intensified dramatically.

Facing enormous liabilities and overwhelming defense costs, many defendants ended up in bankruptcy, including a number of companies previously considered to be immune from financial difficulty. See *In re Asbestos Products Liability Litigation*, 771 F.Supp. 415, 420 (J.P.M.L. 1991). Beginning in 1982 with Unarco Industries, Inc. and Johns-Manville, Inc. the list of corporate asbestos bankrupts now includes such defendants as Celotex Corporation, Eagle-Picher Industries, Inc., H. K. Porter Company, Inc., Keene Corporation, National Gypsum Company, Forty-Eight Insulations, Inc., and Raymark Industries, Inc.

As asbestos-related personal injury litigation mushroomed in the 1980s, asbestos dockets across the country grew exponentially, and plaintiffs in many jurisdictions began to face substantial delays in having their

claims resolved. Transaction costs outpaced compensation to victims. Rand Corporation studies in 1983 through 1985 found that only 37% to 39% of money paid by asbestos defendants actually went to victims, with 61% to 63% consumed by transaction costs. Institute for Civil Justice Annual Report, April 1, 1990-March 31, 1991 (RAND).

By 1990, the situation had reached critical proportions. In September 1990, Chief Justice Rehnquist appointed a panel, the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee"), to study asbestos litigation and make recommendations. In November 1990, eight federal district judges with significant asbestos experience sent a letter to the Judicial Panel for Multidistrict Litigation ("MDL Panel"). They urged the MDL Panel to reverse its several prior rulings declining requested MDL transfers, and asked that the MDLL Panel consolidate all federal asbestos litigation in a single judicial district. These judges argued that consolidation would, among other things, "facilitate global settlements," and allow the transferee court to "fully explore . . . national disposition techniques such as classes and sub-classes under Rule 23."

In March 1991, the Asbestos Ad Hoc Committee issued its report. The report has been described as a "ringing condemnation" of the treatment of asbestos claims in the tort system. See *Georgine* v. *Amchem Prods.*, 157 F.R.D. 246, 265 (E.D. Pa. 1994). The Asbestos Ad Hoc Committee stated: "[T]he [asbestos] situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively." Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee Report") at 2 (1991). The Asbestos Ad Hoc Committee also expressed its hope

that some alternative dispute resolution mechanism for processing asbestos claims could be fashioned. *Id.* at 14. It concluded that: "The volume and complexity of asbestos cases have resulted in the violation of a basic tenet of American justice and the spirit of the Civil Justice Reform Act of 1990: speedy and inexpensive resolution of cases." *Id.* at 10

On July 29, 1991, the MDL Panel issued an order transferring all federal personal injury asbestos litigation to Judge Weiner of the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings. *In re Asbestos Products Liability Litigation*, 771 F.Supp. 415. The MDL Panel voiced its hope that the MDL transfer might foster global settlements of the "asbestos mess," noting that transfer "offer[s] a great opportunity to all participants who sincerely wish to resolve these asbestos matters fairly and with as little unnecessary expense as possible." *Id.* at 424. At the time of the MDL transfer, almost 30,000 asbestos-related personal injury claims were pending in the federal courts, with two times that number pending in the state courts. *Id.* at 416, 421.

After the MDL transfer, Judge Weiner appointed plaintiffs' and defendants' steering committees for the MDL litigation, the members of which included Ronald Motley, of Ness Motley, as one of the co-lead counsel of the Plaintiffs' Steering Committee; Steven Kazan, of the law firm Kazan, McClain, Edises & Simon, as a member of that committee; and Stephen M. Snyder,[3] counsel for Fibreboard, as a member of the Defendants' Steering Committee. One of the tasks of the steering committee

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[3] **Mr. Snyder is a partner in the San Francisco law firm Brobeck, Phleger & Harrison. Since the early 1980's, Mr. Snyder's representation has focused on asbestos litigation defense and, in particular, the defense of Fibreboard. Between 1985 and 1988, he represented the members of the Asbestos Claims Facility in northern California, and served on a number of national committees of that organization. Since 1988, he has been Fibreboard's national counsel for defense of asbestos bodily injury cases.**

was to attempt to solve the asbestos crisis on a global basis.

Settlement negotiations began between the Plaintiffs' and Defendants' Steering Committees in the MDL litigation. The parties made substantial efforts at global negotiations involving all plaintiffs and all defendants. The primary purpose of the MDL settlement talks was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims. Judge Weiner encouraged these global settlement negotiations. The talks did not produce a national settlement, but they did bear fruit. Judge Weiner's unrelenting efforts have resulted in many thousands of claims being settled against some but not all defendants, and they served as a springboard for the subsequent negotiations that eventually led to the settlement of this case. Judge Weiner's efforts also greatly aided the negotiations that resulted in a settlement between asbestos victims and defendants who had formed the Center for Claims Resolution ("CCR"), a claims handling facility created in late 1988 in the wake of the dissolution of a similar organization, the Asbestos Claims Facility. See *Georgine*, 157 F.R.D. at 266-67. Fibreboard had a difficult time fitting itself into the MDL-related settlement talks because it had no cash with which to make settlements.

B. FIBREBOARD BACKGROUND

Fibreboard has employed different strategies to defend asbestos injury cases over time. Early on, like most defendants, Fibreboard relied on *Manville* to bear the brunt of the defense of cases. When Manville declared bankruptcy in 1982, Fibreboard had to rely totally on a then-existing interim agreement under which one of its insurance carriers, Fireman's Fund Insurance Company, provided Fibreboard with a defense of asbestos injury claims and paid indemnity as necessary.

Fibreboard joined the Asbestos Claims Facility ("ACF"), which began operations in 1985. The formation

of the ACF was an effort by more than 30 companies that faced asbestos claims, and by some of their insurers, to create a mechanism to resolve asbestos-related claims through unified claims handling and joint representation in asbestos-related personal injury litigation. The ACF was an insurance settlement. Fibreboard settled policy disputes with certain of its insurers — but not with Continental or Pacific — in order to enter the ACF. Producer members of the ACF, including Fibreboard, received a complete defense and indemnity with respect to claims for compensatory damages, even though they may have had gaps in their insurance coverage.

When Fibreboard entered the ACF, it anticipated that defense costs and indemnity levels would be kept within reasonable limits, and filings of cases in which the claimant did not appear to have any significant disease would be minimized. ACF membership overall did not achieve the results Fibreboard desired on liability and case control issues. In fact, ACF membership drew Fibreboard into types of cases and into jurisdictions where it previously had not been sued and Fibreboard became a "national" defendant sued in regions of the country and in segments of asbestos litigation in which it had not faced liability previously. The result was to double Fibreboard's exposure, even though the facts giving rise to that exposure remained unchanged.

When the ACF ceased operations in October 1988, Fibreboard no longer had any right to a defense or payment of indemnity by Fireman's Fund because the limits of that insurance coverage had been exhausted. Fibreboard had no insurance assets except for the proceeds of two settlements with the American Insurance Group of Companies ("AIG") and with Home Insurance Company, totaling approximately $100 million, and the coverage provided by policies issued by Continental and Pacific that was disputed by the Insurers in then pending litigation. When it left the ACF, Fibreboard did

not have enough cash to pay settlements of asbestos injury cases and Fibreboard's ability to mount a defense was greatly reduced because it had no insurance coverage for defense, it had insufficient funds to pay for defense, and it faced a difficult time putting together a national network of defense counsel in cooperation with other former ACF members who were at odds with one another in the wake of the difficult process of disbanding the ACF.

C. FIBREBOARD'S INSURANCE COVERAGE DISPUTE

Continental issued a comprehensive general liability policy to Fibreboard commencing in May 1957, which Fibreboard terminated effective March 15, 1959. The policy had no aggregate limit, but had a $1,000,000 per occurrence limit and a $500,000 per claim limit. Pacific was alleged to have issued a similar policy to Fibreboard in May 1956.

Since 1979, Fibreboard has been engaged in litigation with Continental and Pacific as to whether Fibreboard is entitled to be defended and indemnified under those policies with respect to asbestos-related personal injury, wrongful death, and related claims. In the early 1980s, Fibreboard's action against Continental and Pacific was consolidated with other similar actions in California. Fibreboard's insurance coverage litigation, came to be captioned *In re Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072* (the "*Coverage Case*").

The *Coverage Case* was tried in several phases. The trial was one of the largest and most complex proceedings in the history of American civil jurisprudence, involving numerous insureds and insurers. At stake for Fibreboard and the insurers was the question of whether Fibreboard would be determined to have no further insurance coverage under the Continental and Pacific policies or, in stark contrast, virtually unlimited coverage under those policies.

The trial court determined that any exposure to Fibreboard's asbestos products during the policy period triggered coverage; that once coverage was triggered, the insurer was liable for the full amount of the damages recovered by the claimant, subject to the per occurrence and per claim limits; and that each claim was a separate "occurrence." The court also ruled that insurers could seek equitable contribution from one another, but not from Fibreboard.

The insurers, including Continental and Pacific, appealed the trial court's decision in the *Coverage Case*, and the appeals were consolidated. Oral argument was conducted in several phases during the Summer of 1993, with the last phase completed on August 27. On November 15, 1993, the California Court of Appeal issued an opinion substantially affirming a number of the principal aspects of the trial court's judgment. However, the Court of Appeal simultaneously granted a joint motion of Fibreboard, Continental and Pacific to sever several insurance coverage issues unique to those parties, and to vacate submission of those issues pending further report to that court on the progress toward obtaining judicial approval of the settlement at bar. Accordingly, the disputes with respect to those severed coverage issues remain unruled upon by the California Court of Appeal, and their outcome thus remains uncertain even at the intermediate appellate level.

There are five issues currently before the California Supreme Court or the California Court of Appeal that have a significant bearing on the ultimate liability of Continental and Pacific to Fibreboard under their primary policies. These issues are commonly referred to as (i) trigger of coverage;[4] (ii) scope of coverage;

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[4] **The California Supreme Court recently determined that a continuous trigger applies in third-party general liability policies.**

(*concluded on page A-211*)

(iii) number of occurrences; (iv) double anchor; and (v) lost policy. Two of these issues — trigger of coverage and scope of coverage — involve both the Continental and Pacific policies. Two issues — number of occurrences and double anchor — involve only the Continental policy. The lost policy issue involves only the Pacific policy. A loss on any one of these issues could substantially impair, if not totally eliminate, Fibreboard's ability to pay future claims. Two expert witnesses, former California Supreme Court Justice Marcus M. Kaufman and Yale University Law Professor George Priest, testified at the fairness hearing with respect to the issue of the risk — viewed both as of August 27, 1993 and today — that Fibreboard would lose the *Coverage Case* pending in the California appellate courts. Based on California law and the concerns and propensities of the California Supreme Court, however, it was the opinion of both Justice Kaufman and Professor Priest that as of August 27, 1993, there was a significant risk to Fibreboard that the California Supreme Court would render decisions on one or more of the coverage issues that would have the effect of either eliminating or substantially reducing further indemnity obligations by Continental and Pacific to Fibreboard for asbestos-related personal injury claims. It was also their opinion that the same risk exists today. No objector proffered any witness, testimony or evidence to contradict or impeach in any way the conclusions provided by Justice Kaufman and Professor Priest.

(*continued from page A-210*)

The court noted the similarity of the trigger issue in the *Coverage Case*, but deemed it appropriate, given the unique nature of asbestos litigation, that trigger of coverage questions specifically involving asbestos claims be left for decision on an appropriate record in a case in which they are squarely presented. See *Montrose Chemical Corp. of California* v. *Admiral Ins. Co.*, 10 Cal.4th 645, 676 n.16, 42 Cal.Rptr.2d 324, 341 n.16, 897 P.2d 1, 18 n.16 (1995).

D. FIBREBOARD AND THE INSURERS

Following the dissolution of the ACF, Fibreboard found itself with large potential asbestos liabilities, about $100 million in cash from settlements of its AIG and Home Insurance policies, and the disputed Continental and Pacific policies. Fibreboard approached the asbestos Plaintiff's bar and explained its situation. The "Structured Settlement Program" ("SSP") was the result. Under the SSP, Fibreboard agreed to settle pre-1959 claims for 40% cash, with the remainder to be paid on September 1, 1993, which deadline could be extended if the *Coverage Case* was not by then resolved, until September 1, 1996. Fibreboard also agreed to conserve its corporate assets, and it agreed that if it lost the *Coverage Case*, all of the companies assets would be turned over to the plaintiffs. The SSP was offered nationwide, and was generally accepted by plaintiffs' counsel, but higher settlement values were demanded to compensate for the risk that the deferred portion of the settlement would never be paid if Fibreboard lost the *Coverage Case*.

In December 1988, Fibreboard and Continental entered into what became known as the "Interim Agreement." Continental agreed to fund the 40% cash portion of SSP settlements, which amount was to be reimbursed if Continental won the *Coverage Case*, Continental agreed to fund Fibreboard's defense, up to annual limits or "caps" of $25 million to $29 million per year, and Continental and Fibreboard agreed to cooperate in the management of pre-1959 claims.

The SSP did not solve Fibreboard's settlement problems. Many plaintiffs going to trial against other defendants often took Fibreboard to trial as well rather than attempt to deal with credit and set-off problems created by the SSP. As a result, Fibreboard became a defendant in a number of large consolidated trials which generated substantial defense costs for Fibreboard. Furthermore, Fibreboard's attempts to bring settlement values

back to pre-ACF levels proved costly. In 1988 and 1989, Fibreboard's defense costs were almost twice the value of its negotiated settlements. In 1990, defense costs were $52 million, as compared to the $45 million nominal value in negotiated settlements. By June 1990, Fibreboard reached its annual defense cap under the Interim Agreement, and Continental therefore declined to pay Fibreboard's defense costs incurred thereafter in 1990.

In the course of negotiations to have the defense caps lifted, Fibreboard proposed in late 1990 to Continental and Pacific that the parties negotiate a complete settlement of the policies. Continental declined the proposal. Fibreboard and Pacific pursued the negotiations.

Because Fibreboard had no insurance coverage for post-1959 claims, and because all claims covered under the Pacific policy were also covered under the Continental policy, Fibreboard entered into separate settlement negotiations with Pacific beginning in 1990 and culminating 1992. Under the resulting agreement (the "Pacific II Agreement"), Pacific would pay Fibreboard a maximum of $360 million to cover post-1959 claims, the final amount depending on the outcome of the coverage litigation and Fibreboard obtaining an order determining that Continental would have no further rights against Pacific for any asbestos-related defense or indemnity.

By 1991, Fibreboard was feeling intense pressure to initiate a new settlement program. It was facing major consolidated trials in Texas, Mississippi and Baltimore, and it had exhausted its defense monies under the Interim Agreement's defense caps. In order to shift some of the pressure to Continental, Fibreboard initiated its assignment settlement program. Under that program, Fibreboard paid no cash for pre-1959 claims, but assigned its rights to the proceeds under the Continental policy, together with any bad faith claims. Fibreboard agreed to preserve its net worth and corporate

assets, and agreed that if it lost the *Coverage Case*, it would be responsible to pay the entire settlement amounts. Under the assignment settlement program, Fibreboard typically settled a law firm's entire inventory of cases, with a settlement average of over $11,400 per case, more than twice the $5,400 average under the 40% cash SSP.

Continental objected that the assignment settlements breached the Interim Agreement provisions calling for joint management of cases and claim-by-claim evaluation of cases, that the settlements violated policy provisions prohibiting assignment of policy rights, and that the settlement amounts were inflated, and that the pre-1959 claims were assigned a disproportionately high share of the gross settlement amount in each office-wide settlement agreement. Fibreboard filed a number of lawsuits to test whether it's assignments were valid, and in June 1992, Fibreboard was granted summary adjudication in the Superior Court in Alameda County, California in a case known as *Andrus* v. *Fibreboard Corp.* The California Court of Appeal summarily rejected Continental's Writ of Mandate, and judgment in Andrus was entered in Fibreboard's favor in September 1992.[5] In July 1992, Continental wrote to Fibreboard and stated that it would provide a defense notwithstanding the defense caps in the interim agreement. Fibreboard determined that it would continue the assignment settlement program as long as Continental continued to reserve its coverage position.

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5 The decision of the Alameda County Superior Court in the Andrus case was eventually reversed on appeal. The California Court of Appeal ruled in *Fibreboard Corporation* v. *Continental Casualty Corp.*, No. A059716 (Cal.Ct.App. Oct. 19, 1994), that Fibreboard did not have the right to enter into assignment settlement agreements. On January 4, 1995, the California Supreme Court denied Fibreboard's petition for review, and the decision of the Court of Appeal is now final.

E. GLOBAL SETTLEMENT NEGOTIATIONS

In 1990, the Federal Judicial Center convened a conference of judges, academics and counsel to address the continuing issues related to asbestos litigation. In the wake of the 1990 conference, members of the asbestos bar and the judiciary took preliminary steps toward national action on the asbestos problem. A number of federal judges organized to explore class action treatment of the problem. In July 1990, some members of the asbestos plaintiffs' bar filed a class action in this Court pursuant to Fed.R.Civ.P. 23(b)(1)(B), *Linscomb* v. *Pittsburgh Corning Corp., et al.*, Civil Action No. 1:90cv5000 (E.D. Tex.). The action was commenced on behalf of all persons (present and future) with asbestos-related personal injury claims. Many of the major asbestos defendants were sued in Linscomb, including Fibreboard. Preliminary proceedings were conducted in this Court on Linscomb in the summer of 1990. Steering committees were formed. Ronald Motley and Joseph F. Rice, of the law firm Ness, Motley, Loadholt, Richardson & Poole ("Ness Motley") were appointed to the steering committee, and Mr. Motley was designated as one of the coordinating counsel for the plaintiffs. The parties conducted settlement meetings and explored whether an overall solution to asbestos injury litigation could be found.

Fibreboard approached Mr. Motley to discuss a global settlement because Mr. Motley had been outspoken about the need for alternative approaches to asbestos litigation, and because asbestos lawyers generally advised that Ness Motley involvement would be necessary for any settlement. Mr. Motley, along with his partner at Ness Motley, Mr. Rice, agreed to consider global settlement negotiations on an assignment basis.

Fibreboard also approached Steven Kazan and Harry Wartnick in late 1990 or early 1991. Mr. Kazan and Mr. Wartnick were selected because they had the most information about Fibreboard's West Coast activity, and

the plaintiffs' bar looked to them for guidance in Fibreboard litigation.

Having decided to pursue global negotiations, the Ness Motley lawyers, Mr. Kazan and Mr. Wartnick ("Plaintiffs' Counsel")[6] retained the law firm of Caplin & Drysdale, Chartered, to represent them and assist them in handling certain highly complex tax, insurance, class action and commercial litigation issues that might arise in the negotiations and that they believed might be beyond their areas of personal expertise.

Fibreboard supplied Plaintiff's Counsel with information about its past claims experiences, historical settlement averages, and financial information, on a confidential basis. Plaintiffs' Counsel also drew upon a substantial body of knowledge about Fibreboard that had been collected by them and by other plaintiffs' counsel. During the many years of asbestos-related litigation involving Fibreboard, various plaintiffs' counsel had conducted massive discovery of Fibreboard, including document discovery and depositions of Fibreboard's corporate officers and knowledgeable employees. These counsel had exhaustively examined the evidence bearing upon Fibreboard's involvement with asbestos and its knowledge of the hazards of asbestos. Plaintiffs' Counsel also retained experts to provide an estimated value for Fibreboard absent its asbestos liabilities and to project future asbestos claims against Fibreboard.

Armed with this information, Plaintiffs' Counsel set out to settle the post-1959 claims, which would be Fibreboard's responsibility, to use as a benchmark for assignment settlement of the pre-1959 claims. In November 1991, it appeared that the parties had agreed to price terms of $278 million for post-1959 cases, and

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6 Another Ness Motley partner, Joseph B. Cox, Jr., became involved in these negotiations in May 1992. Tr. at 1074-75. From that point on, the term "Plaintiffs' Counsel" as used herein refers to Messrs. Rice, Cox, Kazan and Wartnick.

$1.86 billion for pre-1959 cases, but negotiations broke down over questions of opt-out rights and contribution and indemnity.

Continental had been kept informed of the settlement negotiations and had attempted to participate, but Plaintiffs' Counsel insisted on negotiating only with Fibreboard as long as there was a coverage dispute. In March 1992, Continental proposed a settlement of just the pre-1959 cases, but Fibreboard objected to any settlement that addressed only part of the company's asbestos litigation problem.

With global negotiations stalled, Fibreboard began negotiating with Ness Motley. An agreement was signed in December 1992, now known as the "Initial Ness Motley Agreement." The Initial Ness Motley Agreement covered approximately 20,000 cases of Ness Motley and associated firms across the country, with provisions to add more cases. The average price per claim under the initial Ness Motley Agreement was $13,000, with post-1959 claims to be funded through the Pacific II settlement, and pre-1959 claims to be settled on an assignment basis.

The Initial Ness Motley Agreement required that Fibreboard obtain either Continental's consent to the assignment or a court order approving the assignment. Thus, pursuant to the Initial Ness Motley Agreement, on January 11, 1993 Fibreboard filed suit in this Court against Continental, *Fibreboard Corp.* v. *Continental Casualty Co.*, Civil Action No. 6:93cv11 (E.D. Tex.), seeking: (i) a declaration that the assignment in the Initial Ness Motley Agreement by Fibreboard to the claimants of Fibreboard's rights under the Continental insurance policy was valid; (ii) a declaration that the amounts Fibreboard assigned pursuant to the Initial Ness Motley Agreement were fair and reasonable; and (iii) a bar order cutting off Continental's equitable contribution rights as against Pacific. Such a bar order was simultaneously sought by

Fibreboard against Continental in state court in Alameda County, California.

In February 1993 Continental's parent, CNA Financial Corporation, announced that Continental was ready to discuss a global settlement with Fibreboard. A status conference was held before this Court on March 10, 1993, at which representatives of Fibreboard, Continental and Ness Motley were present. The Court and the parties discussed the possible appointment of a Settlement Facilitator, and on March 23, 1993, the Court appointed Judge Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit to act as Settlement Facilitator in connection with the litigation pending in this Court between Fibreboard and Continental.

The parties set out the status of the matter and the parties' respective positions for Judge Higginbotham, and after hard-fought negotiations arrived at an agreement on April 9, 1993 (the "April 9 Agreement"). The April 9 Agreement provided, *inter alia*, that the parties would use their best efforts to achieve a global resolution of all of Fibreboard's asbestos liabilities, including the resolution of present cases and resolution of future asbestos personal injury claims. In the negotiations leading up to the April 9 Agreement, Continental took the position that any global settlement with Fibreboard had to be structured as a non-opt-out class action. For Fibreboard, the *sine qua non* was that any settlement be funded within Fibreboard's available insurance resources.

Pacific had not participated in the negotiations leading up to the April 9 Agreement because it considered the Pacific II Agreement to be binding. In response to the Fibreboard suit seeking approval of the Initial Ness Motley Agreement, and after having reached the April 9 Agreement, on April 13, 1993 Continental commenced a separate suit in this Court against both Fibreboard and Pacific, seeking a declaration that Conti-

nental's rights to equitable contribution against Pacific were unaffected by the Pacific II Agreement. *Continental Casualty Co.* v. *Pacific Indemnity Co. and Fibreboard Corp.*, Civil Action No. 6:93cv 223 (E.D. Tex.). That suit was subsequently consolidated with Fibreboard's action relating to the Initial Ness Motley Agreement.

Negotiations continued on an on and off basis, sometimes under Judge Higginbotham's supervision and sometimes independently. On July 13, 1993, Messrs. Rice and Cox met in Dallas with Judge Higginbotham and representatives of Continental and Fibreboard. At that meeting Judge Higginbotham offered his view that a global settlement covering both present and future cases appeared too complex to negotiate. Accordingly, he suggested that any global settlement be limited to future cases, and that a settlement of the Ness Motley cases — which could serve as the model for settling the presently pending Fibreboard cases — should precede further global negotiations.

With the continued active assistance of Judge Higginbotham, and after hard-fought, arm's-length negotiations, on August 5, 1993, Continental, Fibreboard and representatives of Ness Motley agreed to an amended Ness Motley Agreement (the "Substitute Ness Motley Agreement") settling substantially all of Ness Motley's presently pending claims. The Substitute Ness Motley Agreement resolved approximately 45,000 presently pending asbestos-related personal injury claims against Fibreboard. The Substitute Ness Motley Agreement, by its terms, was subject to approval by the Court as fair and reasonable, and such approval was sought from this Court on August 5, 1993. On August 9, 1993, after reviewing the agreement itself and conducting a hearing in which this Court considered reports from the parties, from Professor Samuel Dash, and from Judge Higginbotham, this Court gave that approval.

After the conclusion of the Substitute Ness Motley Agreement, Judge Higginbotham addressed a letter to

this Court stating that "I am persuaded that given the momentum of this successful negotiation, you should consider directing counsel to proceed [to explore a settlement of future claims]," and observing that "we could have no better set of parties and counsel to attempt its passage." By statement on the record on August 9, and a formal order of August 11, 1993, this Court appointed Plaintiffs' Counsel to act as negotiating counsel on behalf of a class of future claimants who were exposed to Fibreboard asbestos-containing products and who may have contracted or might in the future contract an asbestos-related disease. Judge Higginbotham continued to serve as Settlement Facilitator.

Negotiations continued, and on August 22, 1993, Continental and Pacific reached an agreement, subject to approval of their respective boards of directors, with respect to equitable contribution rights. Under that agreement, Pacific agreed to share with Continental the costs of funding a global settlement, with Continental funding 65% and Pacific funding the remaining 35%.

Global settlement negotiations continued, and on August 22, 1993, Plaintiffs' Counsel rejected Continental's $1.3 billion offer to settle all future claims. On the night of August 23, 1993, Continental increased the Insurers' offer by $200 million to $1.5 billion, and indicated that it would be their final offer. The Insurers deemed that the $1.5 billion amount was an amount that would and should be acceptable to Plaintiffs' Counsel. Plaintiffs' Counsel rejected the offer and negotiations broke off.

The parties agreed to make one final attempt to settle before the submission of the *Coverage Case* appeal on August 27, 1993. The parties convened in Tyler, Texas on Thursday, August 26, 1993, for one final negotiating effort, with Court assistance in the discussions. After several hours of negotiations, Continental's counsel agreed to recommend to Continental an increase of $25

million and Fibreboard agreed to contribute $10 million remaining from its settlement with Home Insurance Company. The next morning, the Insurers agreed to this increase, and a global settlement amount of $1.535 billion was reached.

Despite this agreement on the price of the settlement, Plaintiffs' Counsel continued to insist throughout the day on August 27 on a number of additional non-price conditions to a deal. These included issues with respect to interest payments on the $1.525 billion contribution of the Insurers to the Settlement, timing of the payment of the Fibreboard $10 million contribution, claims processing arrangements, the cut-off date for class membership (whether it should be the midnight preceding August 27 or the midnight yet to come), and, most significant, Plaintiffs' Counsel's insistence on a backup agreement between Fibreboard and the Insurers resolving the insurance dispute.

Throughout the negotiations that followed the meetings in Dallas the week of August 9, 1993, Plaintiffs' Counsel insisted that they would not agree to a global settlement unless Fibreboard and the Insurers would agree to a "backup" resolution of the *Coverage Case* that would become operative if for any reason a global settlement failed to achieve final court approval. Plaintiffs' Counsel were unwilling to permit a circumstance in which the Insurers might get a "free look" at the ultimate result in the *Coverage Case* while a global settlement was pending approval in the courts. The Insurers were unwilling to agree to such a condition unless such an agreement would cost them no more than a global settlement. This was resisted by Fibreboard, which contended that far more money would be required for defense costs outside the context of a global settlement to put Fibreboard in the same position it would be with a global settlement. The Insurers were nevertheless adamant that they would not agree to pay any more in the context of a backup agreement than in a global

agreement, and, late in the afternoon of August 27, 1993, Fibreboard acceded to this principle as the price of permitting an agreement to be reached with respect to a global settlement. The backup settlement is what is now referred to as the "Trilateral Settlement."

During the afternoon of Friday, August 27, 1993, as discussions continued, the parties were advised that the California Court of Appeal, at the oral argument on the last phase of the *Coverage Case* appeal, had indicated that it would rule on the appeal expeditiously. Although this acted as a further impetus for resolving remaining differences, not until five o'clock in the afternoon on August 27 — after this Court advised the parties that it would soon close for business — was agreement reached in principle on the basic terms of the global settlement now before this Court (the "Global Settlement").

F. THE GLOBAL SETTLEMENT AGREEMENT

The terms of the Global Settlement agreement in principle were announced on August 27 in open court, as follows: Continental and Pacific, on behalf of Fibreboard, would pay into an escrow account their respective shares (pursuant to their sharing agreement) of the cash equivalent of $1.525 billion, plus interest commencing on August 27, 1993, such payment to be made no later than January 1, 1994. In addition, Fibreboard would make a contribution of $10 million to the settlement. These funds would be used by the Trust to resolve — either through litigation or settlement — the asbestos-related personal injury and death claims of a non-opt-out class of persons who have neither filed nor settled such claims before August 27, 1993. The unsettled present cases against Fibreboard would also be identified, and an additional amount — not as of then determined — would be budgeted to resolve them. It was anticipated that to the extent the unsettled present cases could be resolved for less than the budgeted amount, 80% of the difference would be transferred to the Trust.

In addition, Fibreboard would assign to the Trust any and all claims for contribution and indemnity it might have against other joint tortfeasors arising out of certain asbestos-related personal injury claims. Fibreboard would also be responsible for the intake administration of claims for five years, and would be required to provide the Trust with all information — including information that would otherwise be protected by privilege or trade secret confidentiality — as is reasonably necessary for the Trust to evaluate, defend and resolve the claims against it. The Insurers would be responsible for the costs associated with obtaining court approval of the Global Settlement, as well as any fees of Plaintiffs' Counsel that might be awarded by this Court up to a maximum of 3% of the settlement amount, which fees would not be paid out of the Trust's funds.

As announced in this Court on August 27, 1993, in return for the monies to be paid under the Global Settlement, Fibreboard and the Insurers would receive "total peace" with respect to any and all claims, direct or indirect, involving the asbestos-related personal injury and death claims of the class members. The Global Settlement would also include the complete resolution of the insurance coverage dispute between Fibreboard and the Insurers. A prerequisite to presentation of the Global Settlement for court approval was the conclusion of a separate backup agreement between Fibreboard and the Insurers settling the insurance coverage litigation, and providing funds to Fibreboard to be used for the satisfaction of claims against Fibreboard in the event that the Global Settlement were not approved.

G. THE TRILATERAL SETTLEMENT AGREEMENT

On August 30, 1993, Fibreboard and representatives of the Insurers gathered in New York to work out the specific terms of the Trilateral Settlement, which was Plaintiffs' Counsel's precondition for negotiating the details of documenting the Global Settlement. Hard-fought and

contentious negotiations finally yielded an agreement whereby the Insurers would pay a total of $2 billion as a complete resolution of all liabilities under the policies: in effect, a complete policy buyout.

The terms of the Trilateral Settlement, and of a series of provisions amending the April 9 Agreement, were described to this Court on September 9. Plaintiffs' Counsel then filed the complaint in this action later that day. Papers seeking provisional certification of the plaintiff class in this action (the Global Health Claimant Class) and a temporary restraining order against the filing of additional claims against Fibreboard or the Insurers were also filed. This Court thereafter granted the motions for provisional class certification and for a temporary restraining order.

Fibreboard and the Insurers thereafter turned to formally documenting the Trilateral Settlement. Lengthy, hard-fought, arm's-length negotiations toward that end finally resulted in the signing of the Settlement Agreement (the "Trilateral Settlement Agreement") on October 12, 1993. Following the signing of the Trilateral Settlement Agreement, Plaintiffs' Counsel and representatives of Fibreboard and the Insurers turned to the negotiation and drafting of a written agreement reflecting the Global Settlement. Although the terms of the global agreement in principle had been put on the record on August 27, 1993, numerous detailed provisions that are contained in the fully documented agreement remained to be and were negotiated over a two-month period commencing in mid-October 1993. In addition, the "Third-Party Claimant Class Settlement" was negotiated during this time period. The formal documentation of the Global Settlement (the "Global Settlement Agreement"), as well as the Third-Party Claimant Class Settlement (entitled "Defendant Class Settlement Agreement" and now referred to as the "Third-Party Claimant Class Settlement Agreement"), were finalized, including the signatures of all the parties thereto, on December 23, 1993.

KEY SETTLEMENT TERMS

There are four settlement agreements before the Court for approval: the Global Settlement, the Global Third-Party Claimant Class Settlement, the Trilateral Settlement, and the Longshore Settlement. The Global Settlement is intended to settle all future asbestos-related personal injury claims against Fibreboard and its Insurers. In order to accomplish one of the primary goals of the Global Settlement — to get Fibreboard and the insurers out of the asbestos litigation business — some mechanism had to be developed for dealing with contribution and indemnity claims arising out of Global Health Claimant Class member claims against other asbestos defendants. The Global Third-Party Claimant Class Settlement addresses these issues. The Trilateral Settlement, which was negotiated as a back-up to the Global Settlement, is essentially a buy-out of the Continental and Pacific policies, which would provide Fibreboard with a $2 billion fund to settle or defend present and future asbestos claims against it. The Longshore Settlement was negotiated to foreclose the possibility that the Global Settlement might adversely affect the rights of Global Health Claimant Class members who are covered by the Longshore and Harbor Workers' Compensation Act (LHWCA) 33 U.S.C. § 901, et seq.

A. The Global Settlement

The Global Settlement settles all claims for asbestos-related personal injury or death against Fibreboard, Continental and Pacific by all members of the Global Health Claimant Class, and provides a structure for the handling of the proceeds of the $1.525 billion *Coverage Case* settlement and the additional $10 million to be contributed by Fibreboard. In addition, the Global Settlement Agreement discharges the Insurers from any obligations in connection with the insurance policies, whether with respect to asbestos-related personal injury and death claims or not, except for obligations

specifically assumed or preserved in the various agreements between them.

The purposes of the Global Settlement Agreement are: (i) to resolve finally all asbestos-related personal injury claims of the Global Health Claimant Class against Fibreboard and the Insurers, and to direct such claims to the Trust; (ii) to provide for a simple, efficient process by which persons who were injured through exposure to Fibreboard asbestos could quickly obtain a fair settlement or resolution of their claims while safeguarding the claimants' rights to proceed against the Trust in the tort system; (iii) to enhance the likelihood that assets would remain available to injured class members whose claims develop far in the future by limiting how much of the Trust's assets can be paid in any given year; (iv) to prioritize payments so that in the event of any shortfall the sickest claimants are paid first; and (v) to protect the Trust's assets from unduly risky investments.

Under the Global Settlement, Fibreboard, Continental and Pacific receive full releases from the members of the Global Health Claimant Class with respect to any asbestos-related personal injury or death claim, and all such claims will be directed to a Trust for processing and payment pursuant to the procedures set forth in the Trust Distribution Process ("TDP"). In order to receive compensation, claimants must first seek to settle with the Trust. If a settlement cannot be reached, the next step is mediation and then arbitration. If an acceptable resolution still cannot be reached, the claimant may then try the claim in the tort system, subject to the overall limit of $500,000 per claim.[7] Claims that are resolved against the Trust before resort to the tort system will be paid over three years; claimants who exercise their right to exit to the tort system after

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7 Punitive damages and prejudgment interest are not available to any claimant against the Trust.

exhausting the specified claims processing procedures will be paid over as few as five years or as many as ten.

The TDP contains certain spendthrift provisions that limit the proportion of the Trust's assets that can be paid out in any given year to ensure that funds will be available to claimants who assert claims against the Trust years into the future. If funds prove insufficient in any given year to pay all claimants, claimants suffering from more serious diseases are generally paid before those with less severe injuries, and within categories of injuries those claimants waiting the longest are paid first.

B. The Third-Party Claimant Class Settlement

The terms of the Global Settlement Agreement are intended to provide the Insurers and Fibreboard with total protection with respect to claims arising from Global Health Claimant Class Member Claims, i.e., Global Third-Party Claims. Thus, the Global Settlement Agreement provides that it cannot be finally approved until the discharge of and injunction against Global Third-Party Claims are obtained.[8]

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8 **The Global Settlement Agreement contains provisions that deal with the possibility of the Court being unable to issue an order barring all such Global Third-Party Claims against Fibreboard, Continental and Pacific, including an agreement by members of the Global Health Claimant Class to reduce, under certain circumstances, any judgments they obtain against Global Third-Party Claimant Class members in such amounts (up to but not in excess of the amount of the judgment against any such Global Third-Party Claimant Class member) as may be necessary to permit the Court to issue orders providing for the discharge of and injunctions against such Global Third-Party Claims as is required for the entry of Global Approval Judgment.**

In response to objections from two potential Global Third-Party Claimant Class Members, the Commonwealth of Pennsylvania and the State of Rhode Island, the Settling Parties agreed that the fifty states of the United States (and their governmental units and divisions entitled to immunity under the Eleventh Amendment), and

(*concluded on page A-228*)

To this end, a settlement with respect to the claims of members of the Global Third-Party Claimant Class has been agreed upon by Owens-Illinois, as representative of the Global Third-Party Claimant Class, the Global Health Claimant Class representatives, Fibreboard and the Insurers. This settlement is embodied in the Third-Party Claimant Class Settlement Agreement. The Third-Party Claimant Class Settlement Agreement represents a resolution of all Global Third-Party Claims that could be asserted against Fibreboard, Continental or Pacific.

The Third-Party Claimant Class Settlement Agreement contains three principal provisions: (i) that the Global Third-Party Claimant Class will release Fibreboard and the Insurers as to any and all Global Third-Party Claims and agree that Global Approval Judgment shall bar and enjoin permanently Global Third-Party Claimant Class members from prosecuting any Global Third-Party Claims against Fibreboard or the Insurers; (ii) that Fibreboard and the Insurers will release the Third-Party Claimant Class as to any and all contribution or indemnification claims; and (iii) that members of the Third-Party Claimant Class will have the rights set forth in Section H of the TDP.

Section H, in turn, affords different rights in three different scenarios that can arise. First, where a personal injury claimant liquidates his or her claim against the Trust before obtaining a judgment against a Global Third-Party Claimant Class member, the class member receives a reduction of any judgment subsequently

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(*continued from page A-227*)

governments of foreign nations (and units and divisions thereof) entitled to sovereign immunity are not subject to the Court's jurisdiction. The Global Settlement Agreement was therefore amended to provide that Global Health Claimant Class members will reduce judgments in their favor against such entities in such amounts as may be necessary to extinguish any such Global Third-Party Claims under applicable law.

entered against it to reflect the personal injury claimant's recovery from the Trust, in whatever amount is dictated by the set-off, contribution, indemnity or similar principles of the applicable state law. Second, where a personal injury claimant exhausts the Trust process and litigates against the Trust in the tort system, and also files suit against a Global Third-Party Claimant Class member, the class member likewise receives a judgment reduction, in whatever amount is dictated by the applicable state law, for any joint-and-several portion of any judgment against it reflecting Fibreboard's liability share. Third, where a personal injury claimant obtains a judgment against a Global Third-Party Claimant Class member prior to liquidating his or her claim against the Trust, and the Global Third-Party Claimant Class member pays the joint-and-several portion (if any) of that judgment, it succeeds to whatever rights the personal injury claimant would have had against the Trust.[9]

The salient feature of the Third-Party Claimant Class Settlement is thus that it preserves all rights the Global Third-Party Claimant Class member would possess as against the Trust under applicable law in those cases where a personal injury claimant recovers from the Trust first; and it affords the Global Third-Party Claimant Class member all of the personal injury claimant's rights against the Trust (with the minor exception of the right to exit to the tort system) in those cases where such a claimant recovers from the class member first. For this reason, the Third-Party Claimant Class Settlement affects Global Third-Party Claimant Class members principally in that their contribution and indemnification claims will be addressed through set-offs and subrogation rights stemming from

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9 There is one exception: if the class member were not satisfied with the Trust's offer, it — unlike a personal injury claimant against the Trust — would not be permitted to exit to the tort system; the matter would instead be resolved through binding arbitration.

settlements and proceedings involving the Trust, rather than Fibreboard or the Insurers.

The Third-Party Claimant Class Settlement provides a substantial benefit to Global Third-Party Claimant Class members. By facilitating the Global Settlement, the Third-Party Claimant Class Settlement creates a trust with over $1.5 billion available to pay claims and, in accordance with applicable law, to offset obligations of members of the Global Third-Party Claimant Class. Very few objections to the Third-Party Claimant Class Settlement have been asserted.

In addition, the Third-Party Claimant Class Settlement provides a reasonable, reliable, fair and predictable mechanism to handle third-party claims. Because the Third-Party Claimant Class Settlement avoids intensive litigation of the sort that occurred in the *Manville* proceedings, the complexities of attempting to create a new rule in the tort system, and the uncertainties of leaving third-party issues to further litigation, this Court finds that the Third-Party Claimant Class Settlement is better than any alternative.

The Third-Party Claimant Class Settlement Agreement was the product of negotiations among Plaintiffs' Counsel, Fibreboard and representatives of the major asbestos manufacturers. These negotiations were sophisticated, arm's-length and non-collusive. Indeed, these negotiations resolved an issue that has been the subject of contentious disputes in other asbestos-related settlement proceedings, such as *Georgine* and *Manville*.

The overwhelming credible testimony demonstrates that the Third-Party Claimant Class Settlement Agreement is fair, reasonable and adequate, and that its benefits far outweigh the incidental restrictions it places on members of the Global Third-Party Claimant class.

C. The Trilateral Settlement

The Trilateral Settlement Agreement, settles the insurance coverage disputes between Fibreboard and the Insurers whether or not the Global Settlement is approved or successfully withstands subsequent attack. The Trilateral Settlement Agreement provides that, upon specified court determinations, Continental and Pacific shall be discharged from any further obligations or liabilities to Fibreboard or to any other person or entity under or in connection with the insurance policies issued to Fibreboard whether asbestos-related or not (except for obligations that an Insurer has specifically assumed or preserved under the Trilateral Settlement Agreement, the April 9 Agreement, the Global Settlement Agreement or the Supplemental Agreement). The Trilateral Settlement Agreement does not, however, preclude the assertion of any such claims against Fibreboard. In addition, the Trilateral Settlement Agreement provides for Fibreboard to indemnify Continental and Pacific against certain further asbestos-related personal injury claims whether or not the Global Settlement is approved or successfully withstands collateral attack.

If the Global Settlement is not approved but the Trilateral Settlement is approved, the $1.525 billion plus interest from the Insurers, plus an additional $475 million, less certain deductions, will be made available to Fibreboard, either directly or through a trust, to enable Fibreboard to pay defense costs and claims with respect to asbestos-related personal injuries — not only claims not filed or settled prior to August 27, 1993, but also asbestos-related personal injury claims against Fibreboard that were unsettled as of August 23, 1993. Fibreboard may also use up to $65 million from these funds for costs associated with asbestos-related property damage claims and non-asbestos claims.

The Trilateral Settlement was the result of hard fought, arm's-length negotiations between Fibreboard and Continental. The negotiations leading to the Tri-

lateral Settlement were intense and contentious, and there is a complete absence of evidence of collusion in connection therewith. The Court is satisfied that the Trilateral Settlement is fair and reasonable.

D. THE LONGSHORE SETTLEMENT

On December 5, 1994, the Global Health Claimant Class representatives, on behalf of themselves and the Global Health Claimant Class, Bethlehem Steel Corporation, on behalf of itself and a class of employers and insurance carriers (the Longshore Defendant Class), and the Director, Office of Workers' Compensation Programs, United States Department of Labor (the "Director"), entered into a settlement with respect to certain rights and obligations that members of the Global Health Claimant Class and members of the Longshore Defendant Class might have under the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. §§ 901, et seq., and related statutes.

LHWCA provides that if a person entitled to compensation under LHWCA settles a claim against a third-party for which he or she would be entitled to receive Longshore benefits for less than the LHWCA compensation, the employer is liable for compensation only if the person entitled to benefits first obtained approval of the settlement from the employer and the employer's insurance carrier. 33 U.S.C. § 933(g)(1). If the person entitled to compensation obtains a judgment or settles a claim for more than the LHWCA compensation, the person entitled to benefits is required to notify the Longshore Employer of the judgment or settlement. 33 U.S.C. § 933(g)(2). Failure to comply with § 933(g)(2)'s notice requirements terminates the employer's obligation to pay Longshore benefits.

Plaintiffs' Counsel, the Secretary of Labor, and certain intervenors with potential LHWCA claims were concerned that Longshore employers might assert that the Global Settlement and related judgment constitute

either a settlement under § 933(g)(1) or (g)(2) or a judgment under § 933(g)(2) for which the applicable notice or pre-approval requirements had not been satisfied.

Bethlehem agreed to serve as a representative of a class of Longshore employers. Bethlehem consulted with other Longshore employers during the course of negotiations, and eventually a settlement was reached between Bethlehem and the settling parties in which it was agreed that the final approval of the Global Settlement would not constitute a "settlement" under 33 U.S.C. § 933(g) which would operate to create a forfeiture of LHWCA compensation rights by Global Health Claimant Class members against the Longshore Defendant Class and that Longshore Defendant Class members would have the right (i) to obtain liens or credits; (ii) to receive notice and an opportunity to approve settlements; and (iii) to be informed of judgments and arbitration awards when Global Health Claimant Class members pursue claims against the Trust.

On February 2, 1995, the Court conducted a hearing on the fairness of the Longshore Settlement. No Longshore Defendant Class member or Global Health Claimant Class member appeared at the hearing to voice objections to the settlement, and no Longshore Defendant Class member filed written objections to the settlement. The Longshore Settlement clears a potential obstacle to final approval to the Global Settlement, which in turn potentially reduces the net obligations of members of the Longshore Defendant Class to members of the Global Health Claimant Class. The Court finds the Longshore Settlement to be fair and reasonable.

JURISDICTION

This Court has subject matter jurisdiction over these proceedings pursuant to 28 U.S.C. § 1332. Diversity of citizenship is present and is uncontested, but the Ortiz

Intervenors contend that § 1332's amount-in-controversy requirement is not satisfied.

For diversity jurisdiction to exist, the amount-in-controversy requirement — allegations of damage in excess of $50,000 — must be satisfied. 28 U.S.C. § 1332(a).

In determining the amount in controversy, "the sum claimed by the plaintiff controls . . . [unless it] appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 288-89, 58 S.Ct. 586, 590, 82 L.Ed. 845 (1938). Although the plaintiffs bear the burden of proving the requisite amount in controversy, the burden is not a heavy one, and the plaintiff need demonstrate only that it is not impossible that he or she will recover more than $50,000. See *Seafoam, Inc.* v. *Barrier Systems, Inc.*, 830 F.2d 62, 66 (5th Cir. 1987). In determining the amount in controversy, claims for punitive damages must be included in the computation. See *Bell* v. *Preferred Life Assurance Soc.*, 320 U.S. 238, 240, 64 S.Ct. 5, 6, 88 L.Ed. 15 (1943). The amount-in-controversy requirement is satisfied because each Class member could lawfully allege damages in excess of $50,000.

The amount-in-controversy requirement may be satisfied in mass-tort class actions, including class actions consisting partly or entirely of people who had not, at the time of filing, manifested any symptoms, illness or injury. See, e.g., *In re Joint E. & S. Dist. Asbestos Litigation ("Manville")*, 982 F.2d 721, 734 (asbestos: amount-in-controversy requirement satisfied although some members were "exposure only"); *Carlough* v. *Amchem Prods. Inc.*, 834 F.Supp. 1437, 1456-62 (E.D. Pa. 1993) (asbestos: same); *In re A. H. Robins Co.*, 880 F.2d 709, 725 (4th Cir.) (Dalkon Shield: "indisputable that it cannot be said to a 'legal certainty' that the jurisdictional amount herein was not satisfied" where the class included women who had used the shield but who had not yet manifested an

injury), *cert. denied*, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); *In re "Agent Orange" Product Liability Litigation*, 996 F.2d 1425, 1434 (2d Cir. 1993) (*Agent Orange*), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1125, 127 L.Ed.2d 434 (1994). Those members of the Global Health Claimant Class who have been exposed to asbestos, but who have not yet developed recognizable disease or injury, seek, *inter alia*, damages to compensate for fear of cancer and for enhanced risk of developing cancer, damages tied to the need to undergo medical monitoring to detect the early development of asbestos-related disease, and punitive damages. Each Global Health Claimant Class member, including each so-called "exposure-only" claimant, has a good faith basis for arguing for application of authorities permitting recovery for fear of cancer, risk of cancer and medical monitoring. See, e.g., *Potter* v. *Firestone Tire and Rubber Co.*, 6 Cal.4th 965, 25 Cal. Rptr.2d 550, 570-71, 863 P.2d 795, 816 (1993); *Miranda* v. *Shell Oil Co.*, 17 Cal.App.4th 1651, 26 Cal.Rptr.2d 655 (1993); *Barras* v. *Monsanto Co.*, 831 S.W.2d 859 (Tex.App. — Houston [14 Dist.] 1992, *writ denied*). Fibreboard's headquarters are located in California, a state that recognizes claims for medical monitoring and fear of cancer. Accordingly, such claims could be asserted against Fibreboard by all members of the Global Health Claimant Class.

Furthermore even if some class members could not allege damages in excess of $50,000, the Court would still have jurisdiction because all the Class representatives could lawfully allege damages in excess of $50,000. In a class action, so long as the class representatives meet the amount-in-controversy requirement, all other class members fall within this Court's supplemental jurisdiction, regardless of the value of their claims. Moore's Federal Practice, ¶ 0.97[5], at 928 (2d ed. 1994); 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions, § 6.11, at 6-48 (3d ed. 1992).

CLASS ACTION PREREQUISITES

A. RULE 23(a) PREREQUISITES

Rule 23(a) lists four prerequisites to a class action: (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law and fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. A class may be certified if all four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure are met and one or more of the provisions of Rule 23(b) is satisfied. "The district court has wide discretion in deciding whether or not to certify a proposed class." *Jenkins* v. *Raymark Industries, Inc.*, 782 F.2d 468, 471-72 (5th Cir. 1986).

Rule 23 requirements apply to all federal class actions; however, a number of courts have held that they are often more readily satisfied in the settlement context because the issues for resolution by the Court are more limited than in the litigation context. See *In re A. H. Robins Co.*, 85 B.R. 373, 378 (E.D. Va. 1988), *aff'd*, 880 F.2d 709 (4th Cir. 1989); *Officers for Justice* v. *Civil Service Comm'n of City and County of San Francisco*, 688 F.2d 615, 633 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1543 (11th Cir. 1987); *Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 158 (S.D. Ohio 1992), appeal dismissed without op., 995 F.2d 1066 (6th Cir. 1993); see also *2 Newberg on Class Actions* § 11.28 (3rd ed. 1992). Courts have approved settlements and finally certified settlement classes while at the same time holding that class certification for litigation purposes might be improper. See, e.g., *Officers for Justice*, 688 F.2d at 633; *In re Anthracite Coal Antitrust Litigation*, 79 F.R.D. 707, 713-14 (M.D. Pa. 1978) (court approved class settlement while noting that certification for litiga-

tion purposes would be doubtful), *aff'd in part without op. and vacated in part without op. sub nom. Colonial Fuel Co.* v. *Blue Coal Corp.*, 612 F.2d 571 (3d Cir. 1979) (table); *Wilkes-Barre Steam Heat Co.* v. *Blue Coal Corp.*, 612 F.2d 576 (3d Cir. 1979) (table). Other Courts have held that Rule 23 prerequisites may not be relaxed merely because a settlement class is involved rather than a litigation class. See *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 799 (3rd Cir. 1995). This Court approaches the Rule 23(a) prerequisites under the assumption that Rule 23(a)'s requirements are no different in the settlement context than in the litigation context.

Rule 23(a) provides that a class action may be brought if: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

1. Numerosity

The numerosity requirement of Rule 23(a) is obviously satisfied. With Class membership numbering in the hundreds of thousands, joinder of the Class members' claims would plainly be impracticable. See *Boykin* v. *Georgia-Pacific Corp.*, 706 F.2d 1384, 1386 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006, 104 S.Ct. 999, 79 L.Ed.2d 231 (1984) (317-member class met numerosity requirement).

2. Commonality

Rule 23(a) requires that there be at least one legal or factual issue common to all class members. See 3B J. Moore and J. Kennedy, *Moore's Federal Practice* ¶ 23.06-1, at 23-159-23-160 (2d ed. 1993); Jenkins, 782 F.2d at 472 ("The threshold of 'commonality' is not high," as "the rule requires only that resolution of the common ques-

tions affect all or a substantial number of the class members"); *Walker* v. *Jim Dandy Co.*, 638 F.2d 1330, 1336 (5th Cir. 1981). That requirement has been met. All Class members here have an overriding common interest in eliminating the risk posed by the coverage litigation and creating a substantial fund of insurance proceeds to provide compensation for Class members. Consequently, many major issues presented by the Class are common to all of its members, including whether claimants against Fibreboard have a right to substantial insurance proceeds notwithstanding the existence of a coverage dispute; and whether some curtailment of the Class's rights in the tort system is appropriate in order to enable a resolution of the coverage dispute that equitably distributes the insurance proceeds. See *Georgine*, 157 F.R.D. at 316; *2 Newberg on Class Actions* § 11.28, at 11-58–11-60. See also *Jenkins*, 782 F.2d at 473 (affirming class certification of limited issues including liability but not damage and causation).

3. Typicality

"The 'typicality' requirement focuses . . . on the similarity of the legal and remedial theories behind [the named and unnamed plaintiffs'] claims." *Jenkins*, 782 F.2d at 472. Consequently, in the settlement context, it "requires proof that the interests of the class representatives and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." *2 Newberg on Class Actions* § 11.28, at 11-58. The requirement may be met even though "[t]he degree of harm may differ between the representatives and members of the class according to the degree of exposure (if any), the effects of the asbestos disease process, and the nature of the disease contracted by the individual." *Jenkins* v. *Raymark Indus., Inc.*, 109 F.R.D. 269, 272 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986); see also *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 817 (3rd Cir. 1995) (noting that individual issues of cau-

sation, reliance, and damages do not ordinarily preclude class action treatment of mass torts); *Ladd* v. *Dairyland County Mut. Ins. Co.*, 96 F.R.D. 335, 337 (N.D. Tex. 1982). The legal and remedial theories of the representative plaintiffs are typical of the Class. All Class members' claims arise from exposure to asbestos for which Fibreboard may bear legal liability, and all Class members share the following common interests: (i) avoiding the potentially disastrous results of a loss by Fibreboard in the *Coverage Case* appeal; (ii) maximizing the total settlement contribution from Fibreboard and the Insurers; (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transaction costs and delays in compensation; (iv) minimizing the percentage of their compensation diverted from them to pay attorneys' fees; and (v) adopting procedures that provide for payments to claimants in an equitable manner.

4. Adequacy of Representation

The adequacy requirement contains two elements: "The first concerns the qualifications of counsel, and the second concerns the relationship between the interests of the class representatives and the interests of the other class members." Jenkins, 109 F.R.D. at 273.

a. Class Counsel

Class Counsel are highly competent, skilled and experienced members of the plaintiffs' asbestos bar, were well qualified to serve as Class Counsel in this case, and the Court is satisfied that Class Counsel adequately represented the class.

The Ortiz Intervenors contend that Class Counsel's representation was inadequate due to a conflict created by their representation of present claimants at the same time they were negotiating on behalf of the Class. The Court is satisfied that any potential conflicts that could theoretically have arisen between Class Counsel's present claimants and the Class never materialized. Indeed,

given the short window of opportunity to negotiate a global settlement created by the *Coverage Case* appeal, the Court finds it unlikely that counsel less intimately involved with Fibreboard's overall asbestos problem could have reached nearly so favorable a settlement for the Class.

The Ortiz Intervenors also contend that the negotiation of an attorneys' fee agreement more or less at the same time as the negotiation of the Global Settlement taints Class Counsel's representation of the Class.

When fee and settlement negotiations occur simultaneously, there is a danger of collusion between class counsel and the defendant. *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d at 803. In the instant case, however, there is considerably less to the agreement than meets the eye. As a part of the Global Settlement Agreement, the Insurers agreed to fund an attorneys' fee award in addition to the settlement fund in an amount set by the Court up to 3% of the total settlement. Continental was willing to bear the costs of administering the settlement, but it was not willing to fund attorneys fees up to the 25% sometimes awarded class counsel in securities fraud class actions. Class Counsel understood, and Judge Higginbotham made clear to them during the negotiations, that they could not expect that any particular fee would be awarded. There is nothing about the fee agreement that would lead the Court to believe that Class Counsel's representation of the Class was in any way compromised.

b. Class Representatives

The Class representatives have also adequately represented the Class. Class representatives satisfy the adequacy requirement unless they have "an insufficient stake in the outcome or interests antagonistic to the unnamed members." *Jenkins*, 782 F.2d at 472; see also *Georgine*, 157 F.R.D. at 317 ("The key question is whether

their interests are *antagonistic*.") (quoting *Steiner* v. *Equimark Corp.*, 96 F.R.D. 603, 610 (W.D. Pa. 1983)) (emphasis in original). And "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 208 (5th Cir. 1981).

The Class representatives have a sufficient stake in the outcome, and the interests of the Class representatives and the members of the Class are not antagonistic. The Class representatives span the range of the various medical categories under the Trust Distribution Process and include both already-impaired and not-yet-impaired claimants. The Class representatives and the members of the Class — all of whom are equally at risk in the coverage litigation — are united in seeking the maximum possible recovery for their asbestos-related claims. See *Jenkins*, 109 F.R.D. at 274.

The Class representatives played a sufficient role in the action, notwithstanding that they were named after the agreement in principle was reached and that they relied on Class Counsel in the subsequent settlement negotiations. "It is not a requirement that representative plaintiffs have specific knowledge of the claims and issues in the action, or that they play a personal role in the direction and management of the action." *Georgine*, 157 F.R.D. at 317. See *Longden* v. *Sunderman*, 123 F.R.D. 547, 558 (N.D. Tex. 1988) (the law well recognizes that, in "complex" matters, "it is unreasonable to expect the class representatives to possess detailed, personal knowledge"); *Gibb* v. *Delta Drilling Co.*, 104 F.R.D. 59, 77 (N.D. Tex. 1984). "[T]he primary criterion for determining whether the class representative has adequately represented his class . . . is whether the representative, *through qualified counsel*, vigorously and tenaciously protected the interests of the class." *Gonzales* v. *Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973) (emphasis added);

accord, *Longden* v. *Sunderman*, 123 F.R.D. at 559; *Durrett* v. *John Deere Co.*, 150 F.R.D. 555, 558 (N.D. Tex. 1993).

B. RULE 23(b)(1)(B)

Rule 23(b)(2)(B) of the Federal Rules of Civil Procedure provides that a class action may be maintained if the prerequisites of subdivision (a) of Rule 23 are satisfied, and in addition "the prosecution of separate actions by or against individual members of the class would create a risk of . . . adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

Rule 23 is to be interpreted according to its "plain meaning." See, e.g., *Pavelic & LeFlore* v. *Marvel Entertainment Group, Div. of Cadence Indus. Corp.*, 493 U.S. 120, 123, 110 S.Ct. 456, 458, 107 L.Ed.2d 438 (1989). As used in the Rule, the requisite "risk" of impairment need not be a certainty or even a better — than 50% likelihood. Instead, the term "risk" refers only to a "substantial probability," which has been described as — "more than a mere possibility" but "less than a preponderance." *In re Joint Eastern and Southern Dist. Asbestos Litigation ("Manville")*, 129 B.R. 710, 765, *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993); *accord In re Granada Partnership Sec. Litigations*, 803 F.Supp. 1236, 1244 (S.D. Tex. 1992); *In re Joint Eastern and Southern Dist. Asbestos Litigation ("Eagle-Picher")*, 134 F.R.D. 32, 35 (E. & S.D.N.Y. 1990); *In re First Commodity Corp. Customer Accounts Litigation*, 119 F.R.D. 301, 312 (D. Mass. 1987); *Jenkins*, 109 F.R.D. at 276-77; *In re Jackson Lockdown/MCO Cases*, 107 F.R.D.. 703, 713 (E.D. Mich. 1985); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 726 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988).

No one disputes that there was a significant risk — more than a mere possibility — that Fibreboard would lose on one or more issues in the *Coverage Case*, or that Fibreboard might lose its insurance coverage as a result of its assignment settlement program. The Court heard expert testimony regarding the risks, and the risk inherent in Fibreboard's insurance dispute is further reflected in the fact that Fibreboard's settlement average under its no-cash assignment settlement program was more than twice its the settlement average under the 40% cash SSP. The risk that available funds could be inadequate to pay all claims constitutes a risk of substantial impairment under Rule 23(b)(1)(B).

The need to protect Class members' "common interests" in the insurance proceeds subject to the coverage dispute demands a unitary resolution permitting equitable distribution. Numerous courts applying Rule 23(b)(1)(B) have certified classes under the Rule where allowing separate actions would have created a risk that early individual adjudications would have exhausted all available assets. See, e.g., *Manville*, 982 F.2d at 738-39; *In re Drexel Burnham Lambert Group*, 960 F.2d 285, 292 (2d Cir. 1992), cert. dismissed, ___ U.S. ___, 113 S.Ct. 1070, 122 L.Ed.2d 497 (1993); *In re Silicone Gel Breast Implant Products Liability Litigation (MDL 926)*, CV 93-P-11433-S (N.D. Ala., June 1, 1993); *In re Granada*, 803 F.Supp. at 1244; Eagle-Picher, 134 F.R.D. at 35; *County of Suffolk* v. *Long Island Lighting Co.*, 710 F.Supp. 1407, 1418 (E.D.N.Y. 1989), *aff'd*, 907 F.2d 1295 (2d Cir. 1990); *Bush* v. *Rewald*, [1986-87 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 92,999, 1986 WL 15338 (D. Haw., Sept. 4, 1986); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 712-13 (E.D. Mich. 1985); *Coburn* v. *4-R Corp.*, 77 F.R.D. 43, 45-46 (E.D. Ky. 1977). See also *Jenkins* v. *Raymark Indus., Inc.*, 109 F.R.D. 269, 276 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986) ((b)(1)(B) certification is appropriate where "the brink of insolvency will be reached during the litigation").

The Global Settlement resolves both the insurance coverage dispute between Fibreboard and the insurers, and the claims of all class members against Fibreboard and the insurers. The Global Settlement involves a uniquely situated defendant in a mass tort that has created unparalleled problems for the courts and the litigants. The Global Settlement resulted from a unique set of circumstances not likely to be repeated. Resolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised. On these facts, allowance of individual adjudications by class members would have destroyed the opportunity to compromise the insurance coverage dispute by creating the settlement fund, and would have exposed the class members to the very risks that the settlement addresses — a situation that falls squarely under Rule 23(b)(1)(B). See *In re Jackson Lockdown*, 107 F.R.D. at 708, 712; *In re A. H. Robins*, 85 B.R. at 380.

Whether mandatory class certification is appropriate in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute is not a question this Court need answer here. In such a case, if the settlement failed because separate actions were permitted, the defendant would retain the settlement funds (or the insurance coverage), and there might not be the "impair[ment]," to class members' "ability to protect their interests" required for mandatory class certification by Rule 23(b)(1)(B), so long as the defendant has adequate funds to pay all class members' claims. The destruction of the settlement fund here, however, constitutes a "risk" within the meaning of Rule 23(b)(1)(B) because the source of that fund (and any meaningful recovery for the Class) is a non-defendant whose obligations are seriously in doubt and may well disappear entirely if the settlement were to fall through — with the result that Class members could not then secure their due through litigation.

The Ortiz Intervenors and the Flanagan Intervenors object that this class action cannot be maintained under Rule 23(b)(1)(B), alleging that there is no genuine "limited fund" because Fibreboard is allowed to retain most of its non-insurance assets under the settlement. The objection is misplaced for two reasons. First, although the limited fund situation is commonly associated with Rule 23(b)(1)(B), the Rule itself does not require a limited fund. Second, even under a limited fund analysis, and there is a limited fund in this case, see Conclusions of Law ¶¶ 37-39, the fact that Fibreboard retains most of its equity under the Global Settlement is irrelevant to the propriety of mandatory class certification. The Court need not ensure that a defendant designate a particular source of its assets to satisfy the class' claims; the Court need only determine whether the amount recovered by the class is fair. *Drexel*, 960 F.2d at 293. There is no authority or reason why Class Counsel may settle a 23(b)(1)(B) class action only if all of the defendant's resources are included in the settlement. Such a rule would make no sense, would discourage settlements and has been rejected. See, e.g., *In re Granada*, 803 F.Supp. at 1244; *Bush*, [1986-87 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 92,999. In terms of the expected recovery for class members, the Global Settlement is far superior to either the Trilateral Settlement or to no settlement at all.

FAIRNESS ISSUES

Federal Rule of Civil Procedure 23(e) requires the Court to determine whether a class action settlement is "fair, adequate, and reasonable." *Parker* v. *Anderson*, 667 F.2d 1204, 1209 (5th Cir.), *cert. denied*, 459 U.S. 828, 103 S.Ct. 63, 74 L.Ed.2d 65 (1982); *In re Corrugated Container Antitrust Litigation*, 643 F.2d at 207. The Court cannot modify the terms of the proposed settlement; rather, the Court must approve or disapprove of the proposed settlement "as a whole." See, e.g., *Evans* v. *Jeff D.*, 475

U.S. 717, 727, 106 S.Ct. 1531, 1537, 89 L.Ed.2d 747 (1986); *Holmes* v. *Continental Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983); *Cotton* v. *Hinton*, 559 F.2d 1326, 1331-32 (5th Cir. 1977). There is a strong presumption in favor of the settlement's fairness. *Parker*, 667 F.2d at 1209; *Cotton* v. *Hinton*, 559 F.2d at 1331; *Mashburn* v. *National Healthcare, Inc.*, 684 F.Supp. 660, 667 (M.D. Ala. 1988); *Manual for Complex Litigation*, § 30.41 (2nd ed. 1985).

The proposed settlement is not required to "achieve some hypothetical standard constructed by imagining every benefit that might someday be obtained in contested litigation." *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 850 (5th Cir. 1975). Rather, "compromise is the essence of settlement," and the Court may "rely upon the judgment of experienced counsel for the parties." *Cotton*, 559 F.2d at 1330 (some citations omitted).

A. THE REED FACTORS

The Fifth Circuit has set forth six factors to guide the Court's assessment of the fairness, reasonableness and adequacy of a proposed class-action settlement:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives and absent class members.

Reed v. *General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). All factors support approval of the Global Settlement here.

Asbestos litigation is undoubtably the most "mature" of all mass tort litigation. The primary factual and legal issues such as disease causation, product, jobsite and

defendant identification and standard of care have been identified and developed through extensive litigation. Despite the maturity of asbestos litigation, it continues to be expensive, time-consuming, and complex. The problem now is that asbestos litigation has become over-mature. Issues that have already been fully developed and resolved are nonetheless rehashed and relitigated, all contributing to the delay, high transaction costs, and arbitrary results that have become the hallmarks of asbestos litigation.

At the time the Global Settlement was reached, Class Counsel were thoroughly familiar with asbestos litigation in general and with Fibreboard's situation in particular, and were extremely well-equipped to represent the interests of the Class. The Global Settlement was the result of hard fought, arm's-length negotiations among the Settling Parties. Indeed, those negotiations were frequently contentious and even bitter. At numerous points the negotiations broke down and were almost scuttled entirely. Not until December 23, 1993, when the written Global Settlement Agreement was signed, was it clear that a final agreement would actually be reached. The record contains no evidence of collusion, and establishes that the Global Settlement amount of $1.535 billion is well within the range of values the Court could properly approve as a fair and reasonable compromise. Very few objections to the settlement have been asserted, despite the extremely extensive notice campaign that was conducted in connection with it, at a cost of more than $22 million. It is highly unlikely that the Insurers or Fibreboard would have agreed to pay more than the amounts they agreed to pay in the Global Settlement, and the Court is satisfied that the Global Settlement is fair, reasonable and adequate.

B. THE ALTERNATIVES

It is appropriate in assessing the fairness of a class settlement to compare the risks and rewards of the

Global Settlement with other possible outcomes. While there is no way to predict Fibreboard's future asbestos liability with any certainty, the Court can, based on the work of the experts and the views of counsel, assess the risks to the Class associated with each of the three basic "scenarios" that are presented by the record: the "*Coverage Case* scenario"; the "Trilateral Settlement scenario"; and the "Global Settlement scenario."

The *Coverage Case* scenario assumes that neither the Global Settlement nor the Trilateral Settlement receives final court approval and the *Coverage Case* is prosecuted to a conclusion in the California courts. Under this scenario, there is a significant risk that Fibreboard will be left either with no relevant insurance coverage at all or with coverage for only a small fraction of its total asbestos-related personal injury liability. In that event, Fibreboard would at best be able to meet only a small portion of its total liability to the Global Health Claimant Class, and that allowance of individual, "first come, first served" actions and adjudications with respect to Global Health Claimant Class members' claims would rapidly exhaust all available assets and would leave the great bulk of the class uncompensated.

Even a total win in the *Coverage Case* would not guarantee that the Class would be fully compensated. There is a significant risk that Fibreboard's assignment settlement program may have entirely vitiated the Continental insurance, which would leave Fibreboard with only several hundred million dollars to cover both pre- and post-1959 claims. Any such outcome would guarantee, again, a massive shortfall in funds to compensate the Global Health Claimant Class — and therewith a substantial misallocation of Fibreboard's resources in the event individual actions and adjudications with respect to class member claims were permitted.

And even if Fibreboard were to win in the *Coverage Case* and Fibreboard's right to engage in the assignment settlement program were upheld so that Fibreboard had unlimited coverage for pre-1959 cases, the post-1959 cases, for which Fibreboard would be solely responsible, would sooner or later drive Fibreboard into bankruptcy. Transaction and indemnity costs would quickly consume Fibreboard's relatively modest assets. If Fibreboard were able to obtain the necessary court orders to effect the Pacific II Agreement, its demise might be delayed a few years, but it would not be averted. Fibreboard's bankruptcy would be a disaster for the post-1959s, and for the pre-1959s it would prove to be at least a major and expensive inconvenience.

In comparing the *Coverage Case* scenario with the Trilateral Settlement, the question is whether — from the standpoint of class members — it is preferable to (i) accept the known terms and benefits of the Trilateral Settlement (foremost of which is a $2 billion payment to Fibreboard from the Insurers); or (ii) gamble on both the outcome of the *Coverage Case* appeal and the possibility, regardless of the outcome of that appeal, that Fibreboard would be found to have vitiated its coverage under the Continental policy by its assignment settlement program. Given the extent of those risks, and — given Fibreboard's limited non-insurance assets — the devastating effect that such outcomes would have on class members, the Trilateral Settlement is superior to no settlement at all.

Although the Trilateral Settlement scenario eliminates the risk of the *Coverage Case*, it is nevertheless problematical for the Global Health Claimant Class. There is a significant risk that the Trilateral Settlement (even augmented by Fibreboard's non-insurance assets) would leave a "late-comer" component of the Class without compensation in the event individual actions and

adjudications with respect to class member claims were to be permitted.

Under the Global Settlement scenario, although there are substantial uncertainties involved, and although there is a significant risk — more than a mere possibility — that there will be a shortfall, all Class claims will more likely than not be paid at fair and appropriate values, although it is possible some claims may have to be deferred for some time pursuant to the spendthrift provisions of the Trust.

The funds provided under the Global Settlement are approximately equivalent to the funds available to resolve those claims under the Trilateral Settlement, after allowance is made for resolution of unsettled present claims and other items under the Trilateral Settlement. Under the Trilateral Settlement, however, Fibreboard's non-insurance assets are reachable by asbestos claimants. But this does not mean that more money will actually reach asbestos claimants under the Trilateral Settlement. Fibreboard's total sale value free of all its asbestos liabilities is only $235 million, which is considerably less than the likely savings in defense costs under the Global Settlement. In fact, taking into account the substantially lower transaction costs under the Global Settlement, the Global Settlement will provide substantially more money — at least hundreds of millions of dollars — that actually reaches class members for compensation of their claims than will be provided to them under the Trilateral Settlement. And although there is some risk under the Global Settlement that there will be insufficient funds to compensate all class members, under the Trilateral Settlement there is a substantial likelihood that the funds will be insufficient to compensate all class members. Under the Global Settlement, the operation of the Trust will result in a far more cost-effective system that promotes the settlement of claims rather than the defense of them. If

the Global Settlement is not ultimately approved, the only winner will be the asbestos litigation industry — lawyers on both sides, doctors, consultants, other expert witnesses, etc. — which has historically consumed as much as 63 cents of each asbestos litigation dollar. See Institute for Civil Justice Annual Report, April 1, 1990-March 31, 1991 (RAND).

Under the efficient claims administration and resolution procedures of the Trust, all transaction costs would likely constitute less than 15% of total Trust outlays. Under the Trilateral Settlement, there is a substantial likelihood that Fibreboard would spend a significant portion of the monies made available to it pursuant to the Trilateral Settlement on defense costs in an effort to achieve its litigation goals. Indeed, in the initial years under the Trilateral Settlement regime it is likely that Fibreboard would expend more of the Trilateral Settlement funds on defense costs than on indemnity payments to claimants.

Moreover, under the Global Settlement, claimants' attorneys' fees are limited to 25% of a claimant's recovery against the Trust — in contrast to the 33%-40% fees claimants' attorneys would often recover under the Trilateral Settlement — thus increasing the compensation that is provided to claimants rather than to their lawyers.

Additionally, under the Global Settlement, the operation of the Trust will result in a far more efficient and equitable system of administering claims and compensating claimants. A claim against the Trust will, on average, be processed and resolved much more quickly than a similar claim would be processed and resolved in the tort system under the Trilateral Settlement. As or more importantly, operation of the Trust under the Global Settlement will provide a fair method for compensating claimants that is more efficient and less burdensome than those claimants would experience under the tort system.

CONCLUSION

In sum, the Global Settlement, like all of the settlements involved in this action, is fair, reasonable, and adequate, and inheres to the substantial benefit of its subject class. The Global Settlement is the product of hard-fought arms-length negotiations by competent counsel, and the amount of the settlement is easily within the range of values that the Court could approve. Under the facts of this case, a mandatory, non-opt-out class action is not only an appropriate vehicle to effect the settlement, it is the only way that the settlement could be accomplished. The Global Settlement is better both for the Class and for Fibreboard than the Trilateral Settlement, and both the Global Settlement and the Trilateral Settlement are far superior to the *Coverage Case* scenario. This Court sees no reason why the Global Settlement should not be approved.

The Court on this date also enters its Findings of Fact and Conclusions of Law and the various judgments that collectively reflect the Court's approval of the Global Settlement. What remains is for the Court to review the Report and Recommendation of the magistrate judge regarding attorneys' fees and any objections that may be lodged against it.

The Court would be remiss if it did not note that the attorneys for Fibreboard, Continental, Pacific, the Class, the Ortiz Intervenors and the *Ad Litems* have performed their tasks in the best tradition of this old and honored profession.

OPINION ON SUGGESTION FOR PANEL REHEARING
[1996 U.S. App. LEXIS 33548]

(United States Court of Appeals — Fifth Circuit)

(Filed December 3, 1996)

(In re: ASBESTOS LITIGATION; JAMES FLANAGAN, et al., VERSUS GERALD AHEARN, et al., Appellees — No. 95-40635)

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Texas. Original Opinion of July 26, 1996, reported at: 1996 U.S. App. LEXIS 18475.

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For FIBREBOARD CORPORATION, (95-40694), Appellee: Kelly C. Wooster, Stephen M. Snyder, San Francisco, CA; William R. Irwin, James L. Miller, Brobeck, Phleger & Harrison, San Francisco, CA.

For ESTABAN YANEZ ORTIZ, EDEE COCHRAN, LESTER EUGENE TAYLOR, JOHN R. ALLGOOD, HENRY WILLIAM EVERS, (95-40694), Amicus Curiæ: Frederick M. Baron, Dallas, TX; Sidney Katherine Powell, S. Ann Saucer, Powell & Associates, Dallas, TX.

For TRIAL LAWYERS FOR PUBLIC JUSTICE, (95-40694), Amicus Curiæ: Arthur H. Bryant, Trial Lawyers for Public Justice, Washington, DC; Anne W. Bloom, Trial Justice for Public Justice, Washington, DC.

For ASSOCIATION OF TRIAL LAWYERS OF AMERICA, (95-40694), Amicus Curiæ: Jeffrey Robert White, Associated Trial Lawyers of America, Washington, DC.

For AMERICAN INSURANCE ASSOCIATION, (95-40694), Amicus Curiae: James L. Kimble, American Insurance Association, Washington, DC.

For ASBESTOS VICTIMS OF AMERICA, (95-40694), Amicus Curiae: Scott McCullen Baldwin, Baldwin & Baldwin, Marshall, TX.

Before REAVLEY, DAVIS and SMITH, Circuit Judges.*

PER CURIAM:

The application for panel rehearing is DENIED.

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

TRANSCRIPT OF SETTLEMENT HEARING
BEFORE THE HONORABLE ROBERT M. PARKER,
CHIEF JUDGE FOR THE EASTERN DISTRICT OF TEXAS

(United States District Court —
Eastern District of Texas — Tyler Division)

(Proceedings of August 27, 1993)

(FIBREBOARD CORPORATION vs. CONTINENTAL CASUALTY COMPANY — Docket No.: 6:93cvll)

APPEARANCES:

For the Plaintiffs: Mr. Joe Rice, Mr. Joe Cox, Mr. Elihu Inselbuch, Mr. Harry Wartnick, Mr. James Scottile.

For Continental Casualty: Mr. Herbert Wachtell, Mr. Rod Eshelman, Mr. Leonard Rosen, Mr. David Gruenstein, Mr. Bill Parker, Mr. Meyer Koplow, Ms. Sarah Shields.

For Pacific Indemnity: Mr. Paul Eschorr, Mr. Richard Reinthaler, Mr. John Minton.

For Fiberboard: Mr. Steve Snyder, Mr. Bill Levin, Mr. Michael Spolan, Mr. Michael Douglas, Mr. William Irwin, Mr. Kelly Wooster.

* * *

August 27, 1993
4:30 p.m.

THE COURT: Be seated. Do you have an announcement now, gentlemen?

MR. RICE: Your Honor, Joe Rice on behalf of the court-appointed negotiating committee. Your Honor, we have been working basically around the clock with CNA and Fiberboard Corporation and lately with Pacific Indemnity trying to come to essential terms on a proposed settlement agreement that we would subsequently get in form and present to the court.

I think the intent today is to try to announce to the Court the significant terms of an agreement that we believe will be reduced to writing in a short period of time at which time we would present it formally to the Court. I think maybe the easiest way to do that, if the Court is — it is agreeable to the Court is just I will try to go through the essential terms and then when I finish if I leave something out, I'm sure there is enough people her to supplement it as we go forward.

As the Court had requested, we are dealing with a futuras action only. Let me get to the microphone so I can get on the record. The agreement is that Pacific Indemnity and CNA, on behalf of Fiberboard would pay into a settlement vehicle trust that would be created, the cash equivalent of $1,525,000,000 plus interest at the 90-day T-bill rate as of today with that deposit to be made no later than January 1, 1994 in a lump sum payment at that time.

They have the option of paying it earlier if they wish, but that if the latest date they can make the deposit into an agreed-to account. The interest drawn on the money thereafter would belong to the trust or the — upon final approval.

In addition, there are a group of unsettled present cases that will be identified, and there is a budgeted amount that will be finalized. It is not quite yet finalized. To the extent that budgeted amount is not needed to resolve that group of unsettled present cases, 80 percent of the amount remaining would then be transferred free and clear to the trust. The trust would then be responsible for complete defense litigation handling of the future cases that would have legal claims for personal injury, asbestos-related injuries as to Fiberboard.

There are two groups of cases that collectively refer to one group as green card cases. In presenting the final definition to the Court, the green card cases will be defined in such a fashion to be considered future cases, green card cases that took a dismissal without prejudice against the Fiberboard Corporation on a previ-

ously filed suit and has the right to come back upon subsequent development of a non-malignant disease process of certain severity or a malignancy. Those would be cases the trust would be responsible for.

As to cases that have previously filed claims against Fiberboard but who received a cancer waiver only, either by settlement with cash payment or by some other negotiated value but their only right is to return for a malignancy claim, those claims would be considered present and would remain the responsibility under any agreement of the settlement trust.

In addition, the Fiberboard Corporation will make a payment of $10 million dollars at present cash equivalent, and that will be used by the trust to fund subsequent annuity-type payment that we would present on future detail to the Court later, but additional payment in addition to the amount paid by CNA and Fiberboard — excuse me, and Pacific Indemnity.

In addition, this will be presented to the Court as a 23(b)(1)(b) class action. This agreement will not be final until the Court has had the opportunity to review it in all of its essential terms to determine the fairness of it, to make a finding on the reasonableness of it, to review it in detail, and take whatever testimony and whatever examination the Court deems appropriate. We want to make it clear at this time this deal is completely contingent upon Court approval and the Court's complete investigation of the deal on all issues that the Court deems appropriate.

In addition to the terms I have set forth, the Fiberboard Corporation will be responsible for the intake administration for a period not to exceed five years. The administrative part would be basically the suits would be filed against Fiberboard Corporation. They would do the intake, put it into the computer system, and then turn to the trust the responsibility negotiation, liquidation, or handling the cases after the global was approved.

Fiberboard, upon approval of the global corporation, will waive any attorney/client privilege, will waive any confidentiality, will waive any trade secrets, and all other essential information necessary to put the trust in the position to fully stand in the place of Fiberboard in the underlying tort litigation for subsequent claimants or members of the class that may claim injury, so that the trust would be in a position to fully understand, evaluate, and defend those actions.

Fiberboard Corporation will assign to the trust any and all claims for contribution and indemnity they have against other joint tort-feasors arising out of asbestos personal injury cases.

To the extent that this settlement or any other actions of behalf of Fiberboard Corporation or the insureds created the availability of additional insurance funds available to the Fiberboard Corporation from companies other than CNA and Pacific Indemnity, those funds will be used solely for the purpose of which they are intended, that is, for the defense and indemnity payments. Generally there will be a written agreement that further elaborates on this, and to the extent that those funds are remaining at the time that they are no longer needed by Fiberboard, any remaining funds will become property of the trust.

There is a provision under the April 9th agreement between CNA and Fiberboard that deals with a $95 million contingent payment by CNA; and that payment, to the extent not otherwise wrapped into these payments, would become property of the trust. We understand that when everything is said and done between Pacific and CNA and Fiberboard during the interim of the operation of the global while we are proceeding through this Court and is necessary through the appellate process, there may not be any of that fund left; but to the extent that it is, it is our position it becomes the property of the trust if it is not already part of the value received.

Your Honor, the agreement when finally presented to the Court would require the carriers of CNA and Pacific

Indemnity to fund all costs of the operation or this proceeding itself through to final resolution and the payment of class counsel attorney's fees as approved by the Court will be the additional obligation of CNA and Pacific Indemnity not to be credited against any previous monies paid or specifically not to be part of the $1,525,000,000 paid into the trust. It would be additional funds once approved by the Court.

THE COURT: The definition of future cases, the definition provided to me earlier representing, as I understand it, the agreement of the parties, is as follows: "The settlement class generally consists of all persons, who have now or may have in the future, asbestos-related injury or death claims against Fiberboard or related companies or person except those who settle those claims or file lawsuits on those claims before August 27, 1993."

MR. RICE: Your Honor, that would be amended when we finalize it about what I said about the green cards and the cancer waivers and also it will be amended to clarify what it meant by related companies or persons. It is the Fiberboard Corporation and those that bear legal responsibility for their asbestos liability, and we will clarify that.

THE COURT: Mr. Wachtell, you rise.

MR. WACHTELL: I just want to be sure that — I think Your Honor, inadvertently omitted the word "personal" when you were reading from the sheet of paper before "injury". I think it is personal injury or death claims.

THE COURT: Did I not say personal? I had intended to.

MR. WACHTELL: I think it was a slip of tongue, Your Honor.

THE COURT: You are correct.

MR. WACHTELL: I just want to be sure that there is nothing about the related companies or persons that expands what we understand we are talking about here, but I don't think we will have any difficulty with that. I have several additions just for clarification and specification to what Mr. Rice has proffered, Your Honor.

MR. RICE: I wasn't finished, but you —

MR. WACHTELL: Oh, I'm sorry, Joe.

MR. RICE: That's all right.

MR. WACHTELL: No, go ahead.

THE COURT: I thought you were through. Go ahead.

MR. RICE: Your Honor, in addition that before this global settlement was to be presented, we understand there will be presented to the Court for approval a bilateral agreement between the insureds and Fiberboard Corporation such that the integrity of this settlement will be preserved against any ruling that may come, be it adverse to one party or the other out of the California insurance litigation. So this settlement will resolve as it relates to this fund being created, the insurance litigation. That in litigation for other reasons may have to go forward one insurer, one carrier, one other manufacturer, we don't know. But the full intent of the parties, as we understand it, is that this settlement will live beyond the outcome of the coverage litigation no matter how that litigation is resolved. And that has to be subject to Court approval, as we understand it, the bilateral as well as the global.

I think those are the essential terms —

THE COURT: You are not talking about California court approval, you are talking about this Court's approval.

MR. RICE: No, Your Honor's Court Approval.

Your Honor, I believe those are the essential terms. I hope I have not left any out; and if I misstate them, I'm sure someone is going to clarify me.

THE COURT: Mr. Wachtell.

MR. WACHTELL: I think I am in accord with most of what Mr. Rice has said and where I am not, I will try to specify. I think he is accurately referring to an agreement in principal for a global settlement of all future personal injury asbestos-related claims against Fiberboard. As he indicated, this includes resolution of the coverage dispute as to these and —

THE COURT: Coverage dispute between CNA, Fiberboard, and Pacific.

MR. WACHTELL: That is correct, Your Honor. And as Your Honor has previously been advised, there is an agreement between Continental and Pacific with respect to the sharing of the settlement, global settlement that we are talking about, subject to Court's approval.

THE COURT: As I understood our previous conversations and the extensive negotiations, this agreement is subject to board approval.

MR. WACHTELL: This global agreement is likewise subject to board approval, Your Honor. Now, to specify things that I think have been mentioned and are understood —

THE COURT: No. You and I did not communicate. This agreement, as I understood it, is subject to board approval on the Fiberboard — I'm sorry on the CNA/Pacific agreement. If CNA and Pacific do not have board approval for that agreement earlier announced, then that is — nullifies the global agreement.

MR. WACHTELL: That is correct. It is a condition to the —

THE COURT: Plus the global agreement is subject to board approval.

MR. WACHTELL: That is correct, as well, Your Honor.

Okay. With respect to the amounts that have been specified to be payable on this global settlement of the future claims, the obligations of Continental and Pacific are several. In other words, each will pay the amount agreed upon between them pursuant to that contract between them, and the aggregate of those amounts will be the amounts that have been agreed upon with Fiberboard and the claimants as recited.

With respect to the escrow fund that is to be created, as correctly indicated, not later than January 1 of 1994, Your Honor, the investments that fund will be subject to joint agreement; and if there is a failure of such agreements, the default provision is that the money will be invested in treasuries of two years or less maturity.

Well, the escrow then — the concept is the escrow is obviously subject to joint control and will follow the question of final approval of the global. If there is final approval of the global settlement, the original principal amount plus accrual — accrued earnings thereon will flow into the settlement trust. Upon failure of such final approval, the fund principal together with earnings will revert to Pacific and Continental in the pro rata shares.

THE COURT: Now, that's not my understanding of the negotiations. It was my understanding that it would revert pursuant to the terms of the bilateral agreement.

MR. WACHTELL: I was going to come to that, Your Honor. If there is a bilateral and that is finally approved then — I was going to refer to that.

THE COURT: Now. Mr. Wachtell, the confusion I have and I might not have understood Mr. Rice, does the interest obligation begin on — at the time of funding which is no later than January 1, '94, or does begin at an earlier date?

MR. WACHTELL: No, unfortunately I think he said it began today.

THE COURT: Well, I didn't hear.

MR. WACHTELL: I'm sorry, Your Honor. I'm sorry to have to say that we had to agree that it begins today.

THE COURT: All right.

MR. WACHTELL: Your Honor, the — as has been indicated, this is — the agreement is for a mandatory non-opt-out clause pursuant to Rule 23(b)(1)(b) of the Federal Rules of Civil Procedure, and I think it is the parties' intent to very shortly be presenting paper appropriate to Your Honor for your consideration of certification, for settlement purposes only of a preliminary certification of such class for settlement purposes.

In return for the monies that Continental and Pacific will be agreeing to pay pursuant to this global settlement, Continental and Pacific and Fiberboard are to be receiving total peace, what I term total peace. This is an all-end settlement with respect to future claims as they have been defined for Your Honor, and that

includes without limitation protection against and bars against any cross claims of any description whether by way of contribution or indemnity, any direct action claims that may exist under the laws of any jurisdiction, any claims by Fiberboard for indemnity defense or anything else under the sun. In other words, these amounts are buying the insurers and Fiberboard total peace with respect to any claims, direct or indirect, involving these future claimants as defined. I think that —

THE COURT: The only element that I recall that I think has not been mentioned, in the unlikely event of failure to achieve Court approval and failure to achieve approval of the — well, or as part of the bilateral agreement, the relation of the funds to Fiberboard's benefit would include the interest.

MR. WACHTELL: Your Honor, I'm sorry. I keep on saying I am going to be referring to that. I guess I am trying to go down on my notes, but if you want me to talk — because I have a number of items on the bilateral —

THE COURT: I thought you were winding down.

MR. WACHTELL: Oh, no. I am just trying to decipher my own handwriting, Your Honor.

THE COURT: I should have know better. Go ahead.

MR. WACHTELL: I think there was reference to — and quite correctly by Mr. Rice to the fact that Continental and Pacific have agreed to pay the reasonable fees of the Plaintiff's negotiating committee as fixed by the Court, and that should be separate and apart from the amount agreed to be paid to futures class. I think should not [*sic*] without meaning to indicate to Your Honor what, you know, is or is not an appropriate fee for Your Honor what, you know, is or is not an appropriate fee for Your Honor to determine upon, that our agreement is — our obligation to pay that amount at least is not to exceed three percent of the overall sum going into the futures class, which I think we have agreed would be the 1.525 billion plus any additional amounts pursuant to the arrangement that Mr. Rice described.

It is intended that the trust and the agreements will have pay-out provisions from the trust designed to provide pay-outs over a 45-year period and that those will be reasonably satisfactory to the insurers and to Fiberboard. It is the intention of the parties, and the parties are agreeing —

THE COURT: Well, let me interrupt you again. It is my understanding that given the agreement negotiated for the additional contribution represented by the $10 million contribution by Fiberboard, that there is an additional 20 years that the trust — so it is a 60-year operation.

MR. WACHTELL: Yes, I think that is accurate, Your Honor. My 45-year reference is to the pay-out and distribution provisions with resect to the funds agreed to be provided by Continental and Pacific.

The parties have agreed to cooperate forthwith to request of the California Court of Appeals before which the appeal in the coverage cases is pending, to refrain from rendering a decision as to those issues that are unique to either Continental or Pacific on the one hand and Fiberboard on the other in that appeal.

It is also intended to be a term of the definitive agreement that upon execution of that agreement, the parties will seek a stipulated reversal in the California coverage cases of the judgement of the superior court, insofar as that judgment was adverse to Continental and Pacific. Fiberboard acquiesces in Continental's having negotiated for an entering into a futures only global settlement, as well as agrees to Continental entering into specific global settlement that is being outlined for Your Honor today and acknowledges that this in entirely consistent with the April 9, 1993 agreement that exists between Continental and Fiberboard.

I do turn to the bilateral agreement, Your Honor, as that would be an agreement between Continental and Pacific on the one hand and Fiberboard on the other to settle any and all claims against Continental or Pacific or their respective policies with Fiberboard, and that

would include direct claimants, cross-claims, claims by Fiberboard, the totality of claims that could be raised under the policy. Such a bilateral would be subject to final Court approval.

And there is, as Your Honor had indicated, a correlation between the — that agreement, as I think Mr. Rice has indicated, is essentially intended to exist as a stand-by agreement in what we all think is the unlikely — well, I should not presume. In the event — I don't want to presume anything. In the event that the global agreement should fail final Court approval for any reason, and my partner Mr. Rose has the language that I think has been discussed between the parties as to the precise correlation of the consideration. Leonard.

MR. ROSEN: This is the — one of the terms what was discussed at some length today was the question of what the cost of the bilateral might be, and the following language I think is satisfactory to both Fiberboard and Continental in terms of what the price term of the bilateral might be: The first element of it is that the — it has to be recognized that the costs for the present settled cases and the unsettled cases are and will remain an unknown. Fiberboard will deal with the negotiations for a bilateral to achieve a reasonable approximation of the anticipated cost to Continental of disposing of those cases under the terms of the April 9th agreement. That is one element, the present settled and the present unsettled.

The second element of price would be with respect to the future class, and there we agree the price, the bilateral price for that element of the bilateral agreement will be calculated and have two parts to it. The first part would be an amount equal to the amount which Continental and Pacific have agreed to pay to the Plaintiffs in a global, including in that amount or plus whatever interest may be earned or actually accrued on that amount since interest is going to comment accruing today, and it is the net amount of that interest. If there are any taxes, that would come off. But the entire

amount plus the net interest would be devoted to the bilateral.

And in addition, the costs of the contemplated fees and expenses of the global that are saved by not doing the global, by which we would mean the costs and expenses referred to of Plaintiffs' Counsel, the notice costs that we are agreeing to; and, in addition, there is an obligation under the April 9 agreement to pay the counsel fees of Brobeck in connection with the global. To the extent any of those costs are saved, that could be relevant price term with respect to the bilateral so that the bilateral would be equal in cost roughly to what the global would have cost.

Lastly, I would mention only as to the April 9 agreement. It is contemplated that the agreement will require some modification, and that it will basically continue in effect with respect to the administration of claims. During the interim period while the global and the bilateral are going through the Court process, and will remain substantially in effect to the extent not inconsistent with the understandings that we have talked about with respect to the global and bilateral, and that will be working out as we negotiate the details of the bilateral, which we will be doing in the next — the near term, the next few days or weeks, Your Honor.

MR. WACHTELL: I think what Mr. Rosen has just said covers my note that — let me just ask him because I don't want to say anything inconsistent from what he was just saying.

(Conference off the record.)

MR. WACHTELL: With respect to certain other provisions of prior agreement between the parties, Your Honor, assuming final approval of a global or bilateral agreement, there is — there are various provisions in the March 27, 1992 agreement between Fibreboard and Pacific with respect on certain contingencies to payments of amounts up to I believe $330 million to be paid by Pacific and Fibreboard. And assuming final

approval of the global and bilateral agreement, it is understood and agreed that those obligations are deemed fully satisfied by the amounts that Pacific is agreeing to pay as its share of the global or bilateral.

Likewise, the same is true as to certain provisions of the April 9, 1993 agreement between Continental and Fibreboard where Continental essentially agreed to back up the payments of Pacific under that prior March 27, 1992 agreement. Those, likewise, will be deemed fully satisfied.

There was a couple of items that Mr. Rice mentioned, which we have not previously been cognizant of, some of which I just want to reserve on because I'm not sure I understand the implications, but I am sure we will work them out in negotiating the definitive agreement. For example, there was a mention — and I'm not meaning to be all inclusive here — of Fibreboard assigning to a trust — to the settlement trust, claims over against others. I'm not sure I have an objection to that. I have just simply not thought through —

THE COURT: The indemnity or contribution claims?

MR. WACHTELL: Excuse me?

THE COURT: The indemnity or contribution claims.

MR. WACHTELL: Yeah, I think if we are getting a full bar order against other people, I may well have no problem with that whatsoever. I simply have not thought through the potential implications and would like — don't want to be deemed to have acquiesced without having done so.

There is one thing that Mr. Rice said that, however, I think I understood enough to say I was not in agreement with it and I think was not understood, I think it is probably going to be an academic issue, and that is that if any money was not expended of the 95 million that is referred to in the April 9, 1993 agreement Continental and Fibreboard, I think Mr. Rice said that any such remainder would flow into the settlement trust.

That I think is not accurate. I think under the terms of the April 9th, 1993 agreement any such money is not

expended of the property of Continental; but again I think there is a good likelihood all that money will indeed be expended, so it is probably an academic point.

Your Honor, I do not think I have anything else on the terms of the understanding of the parties.

THE COURT: Mr. Bschorr.

MR. BSCHORR: Thank you, Your Honor. Just a couple of clarifications to make sure that we have it. We have already discussed these agreements both the Pacific/Continental agreement and the futures agreements to be ultimately written up subject to board approval. We expect to get that board approval promptly.

With respect to the Fibreboard/Pacific Indemnity agreement that has already been referred to by Mr. Wachtell, the basis understanding there is that any monies that we would otherwise be obligated to pay under that agreement, are fully satisfied here or they are paid here, result in a credit so there is nothing more that we are to pay.

One clarification on the California case. As Mr. Wachtell indicated, we are going to file very promptly a letter followed by whatever else is necessary to seek to have the California court first be apprised of what happened here and secondly seek with their indulgence that they not issue an opinion with respect to the discrete issues between Fibreboard — or among Fibreboard, Pacific Indemnity and Continental.

As part of the global futures settlement, there will be, as Mr. Wachtell said, a stipulated reversal request placed to the California court. If that request is granted, it will further — the global will provide that if by chance the global settlement before this Court as it winds its way to the courts approval and the bilateral, which is affixed or annexed to it, both fail of ultimate court approval, final court approval; that at that point, the appeals in California as to those discrete issues will be reinstated before that court for decision by that

court, so that at the end of the day we expect if the global goes forward, if the global doesn't, the bilateral goes forward but only if both fail of ultimate court approval, do we go back to that fall back position.

THE COURT: Well, I had understood contrary to that during the negotiation this afternoon, that if the global fails, if the bilateral fails, the funds would be available to Fibreboard and would not revert back to the parties, including —

MR. BSCHORR: No, I don't understand that at all, Your Honor.

MR. WACHTELL: No, Your Honor, if the global fails, then assuming final approval of the bilateral, then under the fundamental price provisions that Mr. Rosen outlined, the monies that otherwise would have been devoted to the global will be available to the bilateral; but if the bilateral also fails final approval — and let me say because I think I omitted to say, that what is meant by final approval there is a judgment of the Court, final judgment of the Court essentially adjudication and cutting of any claims of any parties, direct, cross-claim, or whatsoever against the insurers or the policies, if that fails final approval, well then all bets are off and the money reverts to the respective insurance companies.

THE COURT: Well, I invite counsel perhaps to have additional conversation. My understanding was that the goal sought to be achieve by Continental and Pacific was to place forever, and with Fibreboard's agreement and with the Plaintiff's agreement, you had negotiated a limit of future liability whetner it is by contribution to the trust or by indemnity payments if the trust and the bilateral fail with Fibreboard receiving the benefit or the accrued interest.

MR. WACHTELL: No, I don't believe —

THE COURT: Am I incorrect?

MR. WACHTELL: I think you are incorrect, Your Honor. It has always been the position of Continental and since Pacific has come to the table, so to speak, that given the magnitude of the dollars that we are talking about

and the areas of the law that are not entirely free from doubt with respect to the power of the parties to enter into a bilateral agreement without participation, for example, of each and every claimant or cross-claimant, that the only way that the insurance companies would be prepared to make such monies available to Fibreboard would be if there was indeed a final court judgement and proceeding to which all potential claimants have been made parties directly or in a representative capacity adjudicating that the agreement was valid, fair, and did cut off all of the rights.

THE COURT: I understand.

MR. WACHTELL: So that has always been an element of the understanding.

MR. BSCHORR: That certainly is my understanding.

MR. RICE: Your Honor, it is our understanding, in simple language I think, if you are going to do a bilateral agreement, if the Court finds that a fair and reasonable agreement, then the global will go forward. If the global goes forward and the Court finds it fair and reasonable and we get final decision, if the global is for some reason not approved, the bilateral stands; if the bilateral is not approved, they are back in California court.

THE COURT: I understand.

MR. BSCHORR: And just the final point, Your Honor, is with respect to the Fibreboard/Pacific agreement of March 1992, there will be a term in this global, that any of those terms in that agreement that are not inconsistent with what we are doing here will be reaffirmed and made part of this agreement so that we have everything presented to the Court for approval and to go out for the full notice. Thank you.

THE COURT: Mr. Snyder.

MR. SNYDER: Your Honor, I am going to limit myself to picking up points where I think some addition or clarification is needed so I am not restating generally any of the terms of the agreement here.

With regard to the interim administration obligation of Fibreboard for a period not to exceed five years, I believe that we should clarify that our agreement is that that is an unconditional obligation for the period that the approval process of this global agreement is in the court. We, that is Fibreboard, will use its best efforts to get the support of its insurers to continue that through the end of the five-year period.

With regard to the waiver of confidences and privileges in order to invest the trust with the information necessary to defend the claims, we expect and there is an agreement, that the trust will be required to keep those confidences and that we will structure the transfer of that information in a way to protect them within the ambit of the attorney/client and work-product privileges to the extent that we can.

With regard to the cross-complaints for contribution and indemnity, those claims and Fibreboard's assignment to the trust, I believe that Mr. Wachtell — Mr. Wachtell arose on this point I believe our agreement is that Fibreboard transfers all of its right and title to those claims. If some right of subrogation under an insurance policy or otherwise an insurance company is the true owner equitably or legally of that claim, then it would be subject to that right.

I simply wish to add to Continental and Pacific, the point on behalf of Fibreboard that Fibreboard also must have board approval, and it will be seeking board approval for entering into this agreement.

Mr. Rosen correctly made the point that the April 9th agreement between Fibreboard and Continental continues in effect with regard to interim claims administration. I would also like to point out that our arrangement is that that agreement is unaffected and continues in effect with regard to the unfinished business of disposing of the settled and unsettled present claims. It is not part of this global agreement, but it is something that survives in the April 9th agreement.

Moreover, the bilateral agreement, the price term on which Mr. Rosen described, that price term is the price term that we have agreed upon in the absence of a global agreement, going back — in the absence of a global approval. Going back to a circumstance that we just discussed. In the event that the global for any reason is not approved, the fall back is the bilateral. The price term under those circumstances is as Mr. Rosen has described it. What that bilateral says about the responsibilities of the parties in the event that the global is approved, is something that is yet to be negotiated as part of that bilateral agreement.

Those are all my remarks, Your Honor.

THE COURT: Anything further from the Plaintiffs?

MR. RICE: A couple of minor points, Your Honor. No. I, we understand that Pacific and Continental cannot today disclose the terms of their agreement, subject to board approval. We understand upon their receiving board approval, which should be in the next few days, that we will be given disclosure in writing as to the terms of that agreement, at which time then we understand that the payments will come one from the — one payment from Pacific and one from CNA, but it is our position that both of those payments must be made before this deal goes forward. This deal is contingent upon both payments being fully made.

In addition, I want to make clear that the escrow funds and the interest or earning on those escrow funds would be used for the benefit of the trust upon approval of the global, and none of those funds would be available to provide for the cost or fees in this case or in the proceedings that we are — will go forward with.

We understand also that a request is being made to the California court to deal with the appeal. There is nothing conditional about what happens in California as far as this deal is concerned. We want to make sure that is clear. And the request from California court to enter

a stipulated reversal is not a condition of the global deal in any way, shape or form.

MR. BSCHORR: The granting of it by the California court. It will be a condition that the application be made.

MR. RICE: Mr. Snyder and I seem to have a little bit of difference on the administrative — the five years versus the period of time. We won't burden the Court now. We will try to work that out, and if not we will be back with the Court on that.

THE COURT: Mr. Wachtell.

MR. WACHTELL: Let me burden the Court on that. I guess I should have arisen to this a moment ago, but I overlooked it in my notes. When we indicated that separate and apart from the monies, that we are agreeing to pay a settlement into the trust that we had independently committed, as I indicated, and the costs of notice and dissemination of notice. We are not agreeing and have not agreed to pay the cost of administration of the trust, and that included in matters that we have not agreed and have not been consulted upon any period of five-year interim administration by Fibreboard let alone any period beyond that. That is not something we are agreeing to.

One other comment by Mr. Snyder, which I am not quite sure I understood, so let me just issue a caveat. He said he was in agreement with Mr. Rosen's description of the price term on a bilateral as a bilateral stood to — as I understood him to say — as a back up to a global, but then he said something about that this was not necessarily the case other that the bilateral being a back up to the global. Without seeking to understand what he was saying, I just want it to be clear that there should be no implication that in any circumstance is the consideration going to be greater than would have been payable — or payments due from us to be greater that what would have been due under the global.

One second, Your Honor.

(Conference off the record.)

MR. WACHTELL: I'm sorry. When we said counsel fees of the class counsel, in my parlance that was meant to include reasonable expenses of class counsel in connection with doing of the deal as well. I did not mean to omit that, Your Honor.

THE COURT: Mr. Wachtell, did you secure the identity of the presiding judge on the California panel.

MR. WACHTELL: Yes, Mr. Eshelman has that, Your Honor.

THE COURT: I will be available to meet with counsel in chambers if you want the Court to advise that court of these proceedings.

MR. ESHELMAN: That will be helpful, Your Honor. It is William A. Newsome, and I have his phone number and address.

THE COURT: Mr. Snyder, you have another matter?

MR. SNYDER: Two minor points, Your Honor, and that will be it. I want to make sure that the record is clear that Mr. Wachtell and the people at Continental have not been consulted with regard to these interim claims administration costs. That's something we need to discuss, but I am not represent [*sic*] that they have agreed to any of this.

Mr. Bschorr — I believe something about the Pacific Indemnity agreement with Fibreboard being satisfied by these payments, and I think that is true only in the event that the final global or the final bilateral occur. If we fall back on our — on the state of no agreement, the state of nature we have now where we have to go back to the coverage case, than either that agreement is reinstate or we have to work out what happens to it because that is not clear.

MR. BSCHORR: That agreement is reinstated.

MR. SNYDER: My remarks with regard to the price term on the bilateral were only intended to emphasize that we had agreed to, Mr. Rosen and I, about the price that is in effect for the future cases component of the Fibreboard liability in the event that the global is not approved, that is, if we have to fall back on the bilateral

terms. Mr. Rosen and I have no agreement on exactly how the bilateral agreement will work if the global is completely finalized.

THE COURT: Thank you, gentlemen. I will meet counsel in chambers if you wish me to have communication with the California court.

MR. WACHTELL: Your Honor, may I just, before you leave the bench, express on behalf of the parties I represent, I think probably on behalf of all parties, a very great appreciation to Your Honor for the effort that went into permitting us to come in to announce this understanding today. I think this is a very, very major transaction. I think it is a major step in solving and giving an example of how a problem that has plagued the courts in nations here can be solved, but I think Your Honor provided spark for this, the guidance, and got us all together and made us stay with it until this deal could be done, and I want to express my thanks.

THE COURT: Thank you, gentlemen.

MR. SNYDER: Your Honor, for the first time in the proceeding I agree with everything Mr. Wachtell says.

(End of hearing.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT M. PARKER,
UNITED STATES DISTRICT JUDGE, PRESIDING

(United States District Court —
Eastern District of Texas — Tyler Division)

(Proceedings of September 9, 1993)

(GERALD AHEARN, JAMES DENNIS and CHARLES W. JEEP, On behalf of Themselves and Others Similarly Situated, Plaintiffs, v. FIBREBOARD CORPORATION, Defendant; CONTINENTAL CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY, Intervenors —Civil Action No. 6:93cv)

APPEARANCES:

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For the Defendant: Brobeck, Phleger & Harrison, by KELLY C. WOOSTER, One Market Plaza, Spear Street Tower, San Francisco, CA 94105.

For Intervenor, Continental Casualty Company: Wachtell, Lipton, Rosen & Katz, by HERBERT M. WACHTELL, MEYER KOPLOW, LEONARD ROSEN, JEFFREY R. BOFFA, 299 Park Avenue, New York, NY 10171; Ireland, Carroll & Kelley, P.C., by BILL PARKER, 6101 S. Broadway, Suite 500, Tyler, TX 75703; Carroll, Burdick & McDonough, by RODNEY L. ESHELMAN, DONALD T. RAMSEY, 44 Montgomery Street, Suite 400, San Francisco, CA 94104.

For Intervenor, Pacific Indemnity Company: White & Case. by RICHARD B. SYPHER, 1155 Avenue of the Americas, New York, NY 10036.

* * *

September 9, 1993
6:00 p.m.

THE COURT: Good afternoon, counsel.

MR. INSELBUCH: Elihu Inselbuch from Caplin & Drysdale. We would like, Your Honor, at this time to file with the Court a class action complaint, United States District Court, Eastern District of Texas, Tyler Division, *Gerald Ahearn, James Dennis and Charles W. Jeep, Plaintiffs, On Behalf of Themselves and Others Similarly Situated* v. *Fibreboard Corporation*. May we hand that up, Your Honor?

THE COURT: Yes, sir.

MR. INSELBUCH: I'm also authorized to advise the Court that the Defendant, Fibreboard Corporation, has stipulated to the service of the summons and the complaint.

THE COURT: The Court will not assign a number until sometime tomorrow since my number-assigning person is not present.

MR. INSELBUCH: Very well, Your Honor.

THE COURT: The Court accepts it for filing and will mark it filed at 6:05 p.m., Central Daylight Time. I should also state for the record that I conferred this afternoon with Robert Sweeney, attorney from Cleveland, that the Court had earlier designated as part of the Plaintiffs' negotiating team. Mr. Sweeney advised the Court that because of potential conflict that he wished to withdraw as part of the team. The court accepted his oral request to withdraw and granted it.

MR. INSELBUCH: Very well, Your Honor. May I now ask Mr. Wachtell to present an additional motion?

MR. WACHTELL: If it please the Court, Herbert M. Wachtell, counsel for Continental Casualty Company, and I believe I am also speaking on behalf of Richard Sypher, counsel for Pacific Indemnity Company, and if I say anything he doesn't agree with I'm sure he will let me know about it.

We wish to present to the Court, Your Honor, a motion on behalf of Continental and Pacific to intervene in the action that has been filed, both as of right and in the Court's discretion, and we have prepared a memorandum of law and we also wish to file a proposed joint intervention pleading.

I'm glad we took great care to get all the papers lined up so we could do this simply, Your Honor. We will have it in a minute.

Your Honor, although I'm quite sure that somewhere I approved a memorandum of law in support of the motion, physically it does not appear to be here. I do have the motion itself. I have the proposed pleading and I think it is —

THE COURT: Go ahead and file your motion, counsel, and I will accept and review your memorandum when filed.

MR. WACHTELL: The grounds of the motion, Your Honor, are that given the fact that both Continental and Pacific are claimed by Fibreboard to be insurers of the obligations that are set forth in the original complaint and given the agreement in principle that has been reached, which they are making the major contribution, they obviously have an interest here to be protected in these proceedings and it is appropriate that they be permitted to intervene under rule 24, Your Honor.

THE COURT: The Court signed the order granting the motion for leave to intervene.

MR. WACHTELL: Thank you very much, Your Honor.

THE COURT: I don't know that it's absolutely necessary. Do you wish to address the proposal regarding certification, provisional certification and/or the TRO?

MR. WACHTELL: Yes, I do, Your Honor. First, Mr. Inselbuch, on behalf of Plaintiffs, says it's perfectly fine for me to lead off on the motion for class certification because — and I want to emphasize this — it is a joint motion. It is a motion in which the corporate parties and the insurers, Continental and Pacific, are joining and the motion asks for certification provisionally, for

settlement purposes only, of a 23(b)(1)(B) class of future claims as defined in the complaint.

THE COURT: I have the proposed order, counsel.

MR. WACHTELL: Your Honor, I have and I would like to file the joint motion for provisional class certification itself, the affidavits and exhibits upon which it is based, to-wit:

(1) The affidavit of Meyer G. Koplow, and there are three fairly hefty, bound volumes of exhibits that are being presented to the Court along with that affidavit;

(2) The affidavit of Roger M. Trangsrud; and

(3) The affidavit of Joseph B. Cox, Jr., who is, of course, one of the class counsel who have been designated here.

We also have, Your Honor, a joint memorandum of law for the Court in support of provisional class certification.

THE COURT: The Court accepts the filings and will mark them as "filed."

MR. INSELBUCH: Elihu Inselbuch, once again. We, on behalf of Plaintiffs, join in the motion for provisional certification in accordance with the papers as drawn.

MR. WOOSTER: Kelly Wooster, Brobeck, Phleger & Harrison, representing Fibreboard. Fibreboard does not appear on the papers filed by the Plaintiffs and Continental and Pacific as one of the moving parties with respect to the motion for class certification. The reason for that is that in an agreement among Continental, Pacific and Fibreboard resolving certain disputes, among them was a condition to a global settlement, and that was the so-called "bilateral agreement."

As of early this morning, we had not reached agreement on all essential terms of that bilateral agreement. Today we did reach agreement on the essential terms of that bilateral agreement, and so Fibreboard joins in the motion for provisional class certification. We will also join in the motion for temporary restraining order and preliminary injunction when that is made. We don't necessarily agree with everything said in all of the papers

since they are not our papers, but we do join in the motions. Thank you.

THE COURT: Thank you, counsel.

MR. WACHTELL: If Your Honor please, because we have prepared extensive papers on the motion which set forth in detail the need and justification for it, I was not planning to address it orally unless the Court has some —

THE COURT: I see no reason for you to. You are not writing on a clean slate here. These matters have been the subject of extensive negotiations between counsel that the Court has participated in.

MR. WACHTELL: The next motion, then, Your Honor, that we wish to file with the court is a motion for a preliminary injunction.

THE COURT: The Court has entered the order provisionally certifying counsel.

MR. WACHTELL: The next motion, then, is a motion by the Intervenors, Continental and Pacific — and as Mr. Wooster just indicated it is a motion in which Fibreboard joins — for a preliminary injunction, and that motion is coupled with a request that Your Honor today enter a temporary restraining order to maintain the status quo.

The moving papers upon that motion, Your Honor, are: the affidavits of Meyer Koplow and Roger Trangsrud previously filed with the Court in support of the motion for class certification, which are doing double duty on this motion, as well, and the exhibits, of course; and an additional affidavit of Bill Parker in support of the Application for a temporary restraining order.

I have the Intervenors' motion for preliminary injunction and temporary restraining order, and I have the Intervenors' memorandum of law in support of the motion for preliminary injunction and for temporary restraining order I respectfully hand up.

THE COURT: Counsel, the Court is signing the proposed order and will set the hearing for 10:00 a.m., September 27, in Tyler, Texas. What is the time now? It is 6:15 p.m.

MR. WACHTELL: Your Honor, because of the large number of persons whom we are seeking to give notice to of the application for preliminary injunction, we have thought that is was desirable and have suggested to the Court — and the Court has now indicated that it is so doing — that the return on the motion be set more than 10 days out in order to give people a reasonable opportunity to be heard and oppose, if they are so minded, and also the order specifies that answering papers should be served I think it's five days up front of the return date so we all can know what we are dealing with.

As a result of that, however, because we are more than 10 days out and because the provisions of the federal rules speak of a temporary restraining order typically only being for 10 days, subject to extension thereafter, we are limiting our request at this time for a 10-day temporary restraining order, limiting our request that a temporary restraining order be simply for a 10-day period.

THE COURT: You are limiting your request to that which you are entitled to ask for.

MR. WACHTELL: That's correct, Your Honor.

THE COURT: The Court has gone ahead and set the hearing in anticipation of extending it because in the real world that's what will happen.

MR. WACHTELL: I want to make it clear that it's our intent to, at the appropriate time, ask for an extension to keep the status quo in place until the Court hears the preliminary injunction. Again, Your Honor, these are very extensive papers and we have set forth an extensive memorandum of law as to why we need the preliminary injunction ultimately and why we need the temporary restraining order right now, and I was not planning to address those issues again unless there's any question.

THE COURT: I see no reason for you to address them.

MR. WACHTELL: Your Honor, in the order to show cause or the order granting the temporary restraining

order and setting the preliminary injunction down for hearing, we have referred to a list of lawyers who have regularly represented asbestos claimants. It is a list to whom we contemplate giving notice as specified in the order, and I want to file that list with the Court.

THE COURT: Very well. Let me inquire of Bill Parker, is it your intention to return to Tyler this evening?

MR. PARKER: Yes, Sir.

THE COURT: You are hereby designated a deputy district clerk of the Eastern District of Texas, and I will entrust the original of the papers to you, if you will deliver them to Ms. Thompson, then, at 9:00 in the morning.

MR. PARKER: I will do so.

MR. INSELBUCH: If I could just add for the record, the service list of counsel is the service list that the Manville Personal Injury Settlement Trust uses, and it is my understanding that that list includes every lawyer who has filed a claim on behalf of a claimant before that Trust, and as far as we are all aware it is the most complete list that we could put together.

THE COURT: Thank you, counsel.

Gentlemen, let me mention one other thing. You are all aware of the fact that I think our country, more than any other that I am familiar with, with England running a close second, has depended on lawyers throughout its entire existence to solve its real problems. I think the work you have performed over the past few weeks, and specifically extremely difficult issues you dealt with the past few days, is in the highest tradition of the profession. I'm proud of you. I've been pleased to be associated with you.

I think you have all represented your respective clients extremely well. I think it is a significant thing you have done and I commend you. We will trust in the scholarship, the good judgment and common sense of the ladies and gentlemen on the courts of appeal in the event this comes to their attention. Anything else we need to be on the record with?

MR. WACHTELL: Your Honor, I would be remiss if I did not express, I think, the appreciation of all of us for the encouragement, counsel, advice and aid that Your Honor has given.

THE COURT: You made my job easy.

MR. WACHTELL: We have tried, but you have been an enormous help to us, Your Honor.

THE COURT: This Court is in recess.

28 UNITED STATES CODE § 455

§ 455. Disqualification of justice, judge or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, provides the grounds for the disqualification.

Rule 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are no questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the finds include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the members from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will

include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative par-

ties or on intervenors; (4) requiring that the pleadings to be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court direct.

(As amended Feb. 28, 1996, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

Nos. 97-1695, 97-1704

Supreme Court, U.S.
FILED
MAY 18 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ESTEBAN ORTIZ, *et al.*,

Petitioners,

—v.—

FIBREBOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY AND PACIFIC INDEMNITY COMPANY

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding with the following exceptions. William James Mitchell is a plaintiff class representative not listed in the petition; and James and Juanita Drake are not class representatives (and, to respondents' knowledge, are not parties).

The following are parents of respondents Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company: CNA Financial Corporation; Loews Corporation. The following are non-wholly-owned subsidiaries of respondent Continental Casualty Company: Convida Holdings, Ltd.; Convida Compania de Seguros de Vida S.A.; Agency Management Services, Inc.

The following are parents of respondent Pacific Indemnity Company: The Chubb Corporation; Federal Insurance Company. There are no non-wholly-owned subsidiaries of respondent Pacific Indemnity Company.

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STATEMENT OF THE CASE

In an attempt to deflect attention from the true nature of this petition — a scattershot array of factbound objections to a *sui generis* case — petitioners have presented the class action settlement in this case (known as the "Global Settlement") and the Fifth Circuit decisions approving it in a totally misleading fashion. They portray the Global Settlement as a carbon copy of the settlement invalidated by this Court in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), where the district court had approved a class settlement solely on the basis of projected increased efficiency over individual adjudications in the tort system. But as both lower courts expressly found — in findings petitioners wholly ignore — the basis of the Global Settlement here is decidedly different: a unitary class settlement was necessary in this case *in order to secure the class's only possible source of meaningful recovery.* App. 73a-74a, 231a-232a, 241a.

As the Fifth Circuit put it, the Global Settlement was "undisputedly driven" by a mammoth coverage dispute between Fibreboard Corporation and its two insurers (App. 75a) — a coverage dispute that receives scant mention in the petition's description of the case. On August 27, 1993, when the Global Settlement was reached in principle, the parties were confronted with the following circumstances. The class, comprised of over 100,000 future asbestos claimants, had potentially well over $1 billion in claims against Fibreboard. Fibreboard, however, also faced more than $1 billion in *current* settlement obligations, and had non-insurance assets sufficient to pay no more than a small fraction of that amount. App. 42a, 277a. Instead, the source of *any* meaningful recovery for class members lay in two insurance policies that Fibreboard had purchased from respondents Continental and Pacific. Although Fibreboard claimed that these policies provided it with no-aggregate-limit coverage, the two insurers were disputing coverage in a California litigation that, as both lower courts found, Fibreboard had a "significant risk" of losing outright. App. 52a, 75a-77a, 357a. The morning of the agreement in principle, the California Court of Appeal had heard the final argument in that litigation and announced its intention to rule expeditiously.

For class members, then, a settlement of the coverage dispute was the *only* possible alternative to catastrophic risk: a Fibre-

Board loss in the coverage litigation would render their claims against Fibreboard, no matter how meritorious, virtually worthless, for Fibreboard would then be left "insolvent simply on the basis of claims already settled." App. 75a, 357a-358a. But as detailed below, a settlement of the coverage dispute was possible only as part of a unitary resolution involving the class. The District Court found (and the Fifth Circuit confirmed) that "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised." App. 232a, 241a, 374a-375a, 75a-77a; *see* pp. 5-7, *infra*.

There is thus no basis whatever for petitioners' overblown cries that the Fifth Circuit's approval of the Global Settlement here was "insubordination" and an "astonishing refusal to apply the rules of law laid down by this Court" in *Amchem* (Pet. 15, 30) — much less any basis for their insistence that this Court must assume the factbound role of correcting an alleged misapplication of *Amchem* less than 12 months after that case was decided and despite the lack of any conflict among the lower courts as to its meaning. To the contrary, this case presents *precisely* what this Court found lacking in *Amchem*: a compelling reason, "commonly held" by all class members, why a class settlement was necessary. App. 57a-58a & n.8. All class members shared the "real and enormous" risk of "the catastrophic results of a loss by Fibreboard in the coverage case," and, consequently, an overriding common stake in an action and a settlement that would fairly resolve that risk. App. 76a, 69a, 58a & nn.7-8. By the same token, "[n]one of the uncommon questions, abounding in *Amchem*, exist in th[is] case": contrary to petitioners' repeated insinuations, the Global Settlement — while resolving the commonly held issues "regarding insurance coverage for the class' injuries and establishment of an equitable distribution process to insure that all class members receive compensation" where there may not be enough money to go around — did *not* liquidate the recoveries of individual class members. App. 3a, 57a-58a & n.8, 85a.

Review is similarly not warranted of petitioners' subsidiary complaints about the non-opt-out nature of this class. In particular, this case does not present the question raised in *Adams*

v. Robertson, 117 S. Ct. 1028 (1997), whether opt-out rights may be denied as to claims for money damages simply because a proposed settlement would provide equitable remedies that would be more efficient than individual suits for damages. To the contrary the plain language of Rule 23(b)(1)(B) and hundreds of years of precedent make clear that a non-opt-out class is called for in cases involving monetary claims where, as here, a unitary resolution is necessary to protect the class. *See* pp. 18-27, *infra*. Petitioners' hodgepodge of objections to the Fifth Circuit's application of this settled law (objections for which they cite virtually no authority at all, much less a valid conflict) present no reason for this Court's review.

Instead, this case presents unique circumstances in which class members needed a unitary resolution in order to resolve a common overwhelming risk; in which no one disputes that the plain language of Rule 23(b)(1)(B) authorized a non-opt-out class; in which an indisputably fair unitary resolution was reached and was approved, after exhaustive inquiries, by the courts below; and in which the appropriateness of such a resolution was established by centuries of jurisprudence. As petitioners' own counsel has previously acknowledged — in a statement completely contrary to the petition's extravagant claim that the Fifth Circuit has "issued an invitation to mass tort defendants nationwide" to flock to "the courts of that circuit" (Pet. 2) — the decision below does not "offer significant precedent for future . . . class actions" because "Fibreboard presented such a unique fact pattern that I do not believe it will ever arise again. [The panel's decision is] only precedent for a class action in the event there is a dispute between an insurance company and an insured where the insured would go insolvent otherwise. That won't occur very often." *Business Insurance*, August 5, 1996, at 38.

I. Background and Procedural History

The Global Settlement, reached on the very eve of the potentially final appellate argument in the coverage litigation after extended, hard-fought negotiations, resolves the risks that litigation posed to the class, to Fibreboard and to the insurers. It does so on financial terms that not even petitioners claim are unfair to the class: payment of over $1.5 billion to be placed in

an asset-conserving, independent Trust for the benefit of "future" claimants in return for their releasing Fibreboard and the insurers from personal injury asbestos claims. App. 49a-50a. And it accomplishes this in a manner that maximizes the amount of money class members will actually receive, by capping claimants' attorney's fees at 25% (well below the 33-40% norm) and by dramatically reducing the costs of defense. App. 362a-366a. Equally important, however, is what the Global Settlement does *not* do: it does *not* liquidate a single personal-injury tort claim for money damages, and it does *not* deprive class members of their right to control their individual claims. App. 58a & nn.7-8, 85a. Instead, those claims will be liquidated on an individual basis as they arise. App. 50a, 346a.

So the District Court found in comprehensive findings of fact, conclusions of law and an extensive opinion issued after an eight-day live fairness hearing featuring testimony by 18 witnesses, hundreds of exhibits and full procedural rights afforded to petitioners — a hearing which itself followed broad discovery by petitioners and an unprecedented $18 million worldwide notice campaign. The District Court found, as noted above, that the risks posed to all parties by the coverage dispute could be resolved "only" through a unitary settlement encompassing all claims, and that "[t]he need to protect Class members' common interests in the insurance proceeds subject to the coverage dispute demand[ed] a unitary resolution permitting equitable distribution." App. 241a, 231a-232a. It went on to find that the Global Settlement is fair to the class, and — given the risks posed by the coverage dispute — indeed represents a "far" superior outcome for the class than any practical alternative. App. 241a-242a, 366a-367a.

The Fifth Circuit affirmed these findings, conclusions and opinion, with one judge dissenting. In an extensive opinion, the court considered and rejected at length each one of the myriad of objections petitioners had raised, including their claim that the District Court's judgment was at odds with the Third Circuit's decision in *Amchem* (then named *Georgine*). Recounting in detail the "stark contrast" between this case and *Amchem*, the Fifth Circuit — correctly anticipating this Court's *Amchem* hold-

ing — held that the class here was valid despite its "like[ly] agreement" that the *Amchem* class was not. App. 57a-58a & n.8.

This Court subsequently remanded this case to the Fifth Circuit for further consideration in light of *Amchem*. The Fifth Circuit ordered briefing on the issue, and heard full oral argument. It then reaffirmed its conclusion regarding the "controlling differences between this case and *Amchem*," with one judge dissenting. App. 2a. Respondents respectfully refer this Court to the District Court's findings and to the Fifth Circuit majority opinions for a full description of the Global Settlement and the circumstances and negotiations that led to it.

II. The Uncontested Record

Petitioners, however, completely ignore the findings of the courts below. They proceed as if the class somehow had no need to participate in a settlement here; as if the coverage dispute were an irrelevant sideshow; and as if the Global Settlement actually liquidated the individual recoveries of hundreds of thousands of individual tort claimants in the name of "tort reform by judicial fiat." Pet. 2. In short, they pretend that this case is *Amchem* itself. This self-serving presentation — which is obviously intended to obscure the fact that, under petitioners' version of the law, there was simply *no way* for the class to protect itself against the risk of the coverage dispute — was roundly rejected by both courts below in findings that petitioners pretend do not exist, but nowhere seriously dispute.

A. The Risk Posed To The Class By The Coverage Dispute Required A Unitary Resolution.

For all their rhetoric, petitioners never take issue with the findings of the courts below that "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised." App. 232a, 241a, 75a-76a. Indeed, Fibreboard and one insurer had earlier tried to settle the coverage dispute *without* the participation of the plaintiffs, and had failed. App. 314a. As the lower courts determined, the unique circumstances of this coverage dispute — involving a claim of no-aggregate-limit, billion-dollar-plus coverage on which the insured's corporate survival was entirely dependent — did not permit a piecemeal settlement. App. 231a-232a, 241a.

To the contrary, from *Fibreboard's* perspective, its coverage claims were the only thing that stood between it and insolvency: it believed it could remain a viable company, solve its asbestos problem and preserve its net worth if it prevailed in the coverage litigation; it would be immediately bankrupt if it lost. App. 357a-358a. Accordingly, it was not about to settle that litigation on terms that would still leave it facing inevitable bankruptcy. Unless it were to receive from the insurers a sum of money sufficient to ensure that it would be in a position to pay all asbestos claims and all costs of defense in an ongoing litigation regime, it was not willing to leave itself naked of insurance and yet exposed to further claims by asbestos plaintiffs. App. 309a, 374a-375a. Thus, from Fibreboard's standpoint, any settlement of that dispute either had to (1) be so financially cushioned that there was no real risk that future asbestos liabilities and defense costs would place its corporate existence in jeopardy; or (2) involve the asbestos plaintiffs.

The *insurers*, for their part, were certainly willing to put enormous funds on the table to rid themselves of the potential open-ended, no-limit exposure claimed by Fibreboard. But they were not willing to forgo their substantial arguments disputing coverage — on which, as the District Court and Fifth Circuit found, they had a significant chance of escaping any liability at all (App. 52a, 75a-76a, 357a) — by giving Fibreboard the "cushion" necessary to place its survival beyond question in the face of continuing asbestos claims and defense costs. App. 330a. Nor were they willing to pay the enormous sums entailed by a settlement without ensuring that they had ended their exposure once and for all. The Fifth Circuit fully compiled the reasons why the insurers could not afford to remain exposed to opt-outs, not the least of which was that the timing of the coverage appeal would have entailed giving class members the right to opt-out *after* the outcome of the appeal was known, and hence a one-way option on the coverage litigation. App. 43a-44a, 306a-307a, 374a. Thus, from the insurers' standpoint, any settlement of the coverage dispute involving sums acceptable to Fibreboard had to involve all the asbestos plaintiffs.

The situation facing the *class* was thus simple. The insurers and Fibreboard could not come to terms on a settlement of the

coverage dispute without involving the asbestos plaintiffs. For that very reason, however, the class had enormous negotiating leverage over both the insurers and Fibreboard, each of which faced catastrophic risk if the coverage dispute continued. Those parties were consequently offering the class a tremendous amount of money as part of a global settlement of their claims — an amount that, while not guaranteeing all class members a 100% recovery, was indisputably a fair resolution of their claims. App. 98a, 359a-361a. The class could either secure that enormous fund for itself, or run the significant risk of losing the insurance entirely by pressing forward with a quixotic pursuit of what remained of Fibreboard's non-insurance assets.

In light of this, petitioners' portrayal of the Global Settlement as an unnecessary expedient designed to let big business off the hook is grossly inaccurate. When the actual nature of the circumstances that gave rise to the Global Settlement are considered, the true import of petitioners' arguments becomes clear: as they would have it, class members — as a matter of their *own* due process rights, no less — had no alternative but to continue to suffer the risks of the coverage litigation.

B. The Fundamental Differences Between This Case And *Amchem*.

This overriding common stake of class members in a unitary resolution renders this case fundamentally different from *Amchem*. As the Fifth Circuit determined, petitioners' portrayal of this case as a carbon copy of *Amchem* is simply unfounded.

1. *Amchem* involved a settlement resolving the claims of "hundreds of thousands, perhaps millions of individuals" having in common nothing beyond "past exposure to asbestos products manufactured by one or more of 20 companies." *Amchem*, 117 S. Ct. at 2237. No reason was offered why these persons had any need for a class resolution of their claims: in particular, no contention was made that class members would lack an adequate source of recovery if permitted to continue to proceed with individual actions. *See id.* at 2249 n.19. Instead, certification was sought under Rule 23(b)(3) not on the basis of class members' needs, but rather (as in Rule 23(b)(3) class

actions generally) simply upon claims of increased "systemic efficiency" over individual adjudications. *Id.* at 2246.

This notwithstanding, the settlement did "'more than simply provide a general recovery fund'" for class members' benefit; it instead made "essential allocation decisions designed to confine compensation and to limit the defendants' liability," decisions that "necessarily favor[ed] some claimants over others." *Id.* at 2243, 2251. For example, the *Amchem* settlement apportioned "individual damages" by specifying a narrow range of damages payable for each disease type. App. 58a & n.8; *see* 117 S. Ct. at 2240. It prohibited inflation adjustment of these ranges, and imposed "case flow maximums" capping the number of claims payable for each disease in a given year. 117 S. Ct. at 2240. And it extinguished without any compensation at all a wide variety of claims, even if they were otherwise recognized under applicable state law. *Id.*

Finally, "[c]lass members, in the main, [were] bound by th[is] settlement in perpetuity, while [the] defendants [could] choose to withdraw from the settlement after ten years." *Id.* at 2241. A "back-end" opt-out right, whereby a class member could exit the settlement and sue in the tort system upon the subsequent manifestation of injury, was limited to a "small number of class members — only a few per year." *Id.* Perhaps unsurprisingly, this settlement came under sharp attack by numerous objectors as financially unfair to the class. *Id.*

The *Amchem* settlement, in sum, took a class of persons with virtually no common interests and no common need for a class resolution, and imposed upon them a class-wide resolution of a host of matters on which their interests sharply diverged.

2. The Global Settlement in this case is different on every level. App. 2a-3a, 57a-58a & nn.7-8. Class members here shared — not simply past exposure to asbestos products — but also the "real and enormous" risk arising from the coverage dispute. App. 76a. *All* class members "faced the real possibility" that an adverse decision in that dispute would leave them no source of recovery whatever. App. 75a. *All* class members thus shared an "identical" need for a class resolution "to avoid the

risks of insurance coverage litigation and to insure that money remains available to pay their claims." App. 3a, 57a-58a.

As the Fifth Circuit found, the class resolution in this case was thus "undisputedly driven" — not, as in *Amchem*, by a search for alternatives to the tort system — but by this common and overriding need of the class. App. 75a, 57a-58a. Class certification was accordingly predicated not on Rule 23(b)(3), but on the very different provisions of Rule 23(b)(1)(B), which provides for class treatment where class members' pursuit of individual actions would create a risk of prejudice to other class members' claims. App. 2a, 72a-85a.

Moreover, as the Fifth Circuit put it, while the Global Settlement resolves the risk to class members by providing an enormous and unquestionably fair amount of "money and an equitable distribution process," it does *not* "award damages to individual victims" or "make any determination" of the "amount" of money to which they are entitled. App. 57a-58a, 85a, 50a. Unlike in *Amchem*, it sets *no* ranges of recoveries for particular diseases and makes "no allocation or difference in award according to nature or severity of injury"; individual recoveries will instead be "subsequently" liquidated on an "individual" basis as they arise through *non*-binding negotiations, mediation or arbitration with an independent Trust, which will consider all historically relevant individual factors and circumstances. App. 2a, 49a-50a, 57a-58a & n.7, 337a, 346a. And if individual claimants are dissatisfied with their proposed recovery for any reason, they have an absolute "back-end" right to litigate their claims in court, with the Trust substituting for Fibreboard as the defendant. App. 50a, 58a n.7, 346a; *see* pp. 12-13, *infra*. *No* objector, petitioners included, challenged this settlement as financially unfair.

As the Fifth Circuit put it, the Global Settlement, in marked contrast to *Amchem*: involved a class sharing an overriding common interest "regarding insurance coverage for the class's injuries and establishment of an equitable distribution process to insure that all class members receive compensation"; resolved *only* those "commonly held questions"; and did *not* resolve the matters — what each class member will actually

recover — as to which class members' interests may differ. App. 57a-58a & n.8; *see also* App. 2a-3a.

C. The Trilateral Agreement Is Markedly Inferior To The Global Settlement.

These findings of the courts below notwithstanding, the coverage dispute goes practically unmentioned in the petition. Indeed, petitioners' primary reference to it is a brief allusion to its having been supposedly "mooted" by the "Trilateral Agreement" between Fibreboard and the insurers. Pet. 2-3 n.2. They assert that the Trilateral Agreement "provides that, if the Global Settlement is *not* approved, the insurers will pay Fibreboard $2 billion — half a billion *more* than the insurers' payment to the trust under the Global Settlement" and that it "guarantees that Fibreboard will have ample insurance coverage with which to pay future asbestos claims." Pet. 4.

These assertions range from the materially incomplete to the flatly untrue. Under the Trilateral Agreement, Fibreboard would indeed receive $2 billion from the insurers if the Global Settlement were not approved — but it would have to use that money to pay a host of claims and other liabilities *in addition* to those advanced by class members, including unsettled asbestos claims of "present" claimants not within the class and the enormous defense expenditures entailed by resolving claims in litigation. App. 361a-362a, 354a-355a. As a result, the record and findings below are uncontroverted that — contrary to the statements in the petition — the Trilateral Agreement is "far" inferior to the Global Settlement from the point of view of the class and does *not* provide enough money to guarantee payment, full or partial, to class members. App. 73a, 358a-359a, 361a-366a. The record is uncontested that the class would in the aggregate receive at least several hundred million dollars *less* under the Trilateral Agreement than under the Global Settlement, and a significant number of class members might well receive *nothing* at all. App. 358a-359a, 361a-362a.*

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* The expert testimony at the fairness hearing laid this out in detail. That testimony was that the class would receive $234-477 million *less* under the Trilateral Agreement than under the Global Settlement, even taking Fibreboard's equity into account. App. 327a-328a; JA7:2054-

Indeed, as the Fifth Circuit summarized the record, under the Trilateral Agreement, "Fibreboard would be unable to pay all the valid claims against it within five to nine years." App. 73a.

The reason for this lies in the origins of the Trilateral Agreement, which is likewise omitted from the petition. The Trilateral Agreement grew out of a last-minute demand by class counsel that, as a condition to the class's entry into the Global Settlement, Fibreboard also as a "back up" settle the insurance dispute directly with the insurers so that — even if the Global Settlement were not approved — the coverage dispute would not proceed. App. 329a-330a. The insurers, however, insisted that such a "back up" agreement cost them no more than $2 billion, notwithstanding Fibreboard's insistence that it needed hundreds of millions of dollars more to pay for the other liabilities described above and the defense costs it would incur in the tort system. App. 329a-330a. The record is clear that Fibreboard yielded only as the price for obtaining agreement to the Global Settlement. App. 314a. It is thus perverse for petitioners to stand the settlement on its head by maintaining that this contingent, inferior "back up" agreement nullifies the class's need for the "far" superior Global Settlement. App. 366a.

D. Bankruptcy Was Not An Available Option.

Although petitioners suggest that bankruptcy would have provided an alternative to a unitary class resolution — and criticize the Fifth Circuit for having "an avowed purpose of circumventing the Bankruptcy Code" (Pet. 11, 21) — they do not quarrel with one central fact: class members could not have put Fibreboard into bankruptcy in August 1993. App. 78a, 376a. Bankruptcy proceedings could have been reached only by forcing Fibreboard to litigate for and *lose* its claimed insurance, the only source of real recovery for the class. App. 76a-79a. Petitioners' suggestion, then, is that the class was required — *required* — to spurn a $1.535 billion settlement and force Fibre-

56, 2768-70; JA125. As a consequence — whereas under the Global Settlement it was more probable than not that *all* future claimants would receive fair and appropriate compensation (App. 359a) — under the Trilateral Agreement 41-50% of the class, between 104,000 and 127,000 asbestos claimants, would likely be left unpaid. JA117; JA118.

board to roll the dice in the coverage litigation: secure in the knowledge that, though coverage might be lost, a bankruptcy proceeding in which class members would receive at most pennies on the dollar would be waiting to "protect" them.

E. The Petition Completely Misrepresents The District Court's Role.

The dramatic license petitioners have taken with the facts of this case is no more evident than in their constant refrains that the District Court "choreographed," "orchestrated" and "coached" the Global Settlement. Pet. 2-3, 26. As the Fifth Circuit found in rejecting petitioners' similar insinuations below, "Judge Parker's role in the negotiating process was insubstantial." App. 89a; *see* App. 46a. The Fifth Circuit's description of the origins of this case is likewise categorically at odds with petitioners' charge that the District Court injected itself into the parties' dispute "before a lawsuit was even filed." Pet. 3. As the Fifth Circuit related, before taking a single action with respect to the negotiations that led to the Global Settlement, the District Court had before it a case: (a) asserting the rights of tens of thousands of asbestos claimants to the proceeds of Fibreboard's claimed insurance; (b) whose filing was concededly intended by Fibreboard and the claimants to pressure the defendant Continental into seeking an overall resolution of the coverage dispute; and (c) where Continental had informed the court that it would be willing to settle only as part of such an overall resolution. App. 42a-43a. And even then, the District Court did not itself participate in negotiations, but rather appointed a separate mediator (Judge Patrick Higginbotham of the Fifth Circuit) to assist the parties. *Id.*

F. The Global Settlement Is Financially Fair.

Finally, despite their vitriol about the alleged sacrifice of the class's rights, petitioners do *not* assert that the Global Settlement is financially unfair to the class. Nor could they. The settlement transforms disputed insurance coverage into over $1.5 billion cash for distribution to class members in accordance with procedures that ensure that the proceeds will not be dissipated on Fibreboard's costs of defense or plaintiffs' transaction costs (including contingency fees).

These overwhelming benefits, as the District Court and Fifth Circuit found, far outweigh the few minor ways in which the settlement might affect the amount of damages some claimants might receive for their claims. App. 372a-374a, 85a. Indeed, these effects are caused principally by provisions designed to *protect* the interests of class members — by avoiding inequitable dissipation of the trust funds through disproportionate windfall awards, *e.g.*, punitive damages against the *Trust* — and should have only minimal impact on class members' individual recoveries.* Moreover, this was a *settlement* in which each of the parties had to make concessions to achieve a resolution that avoided the very major litigation risks that otherwise confronted *each* of them. The important questions are thus whether the $1.535 billion the class was able to extract is fair and reasonable in light of the risks posed by the coverage dispute, and whether receipt of that fund and resolution of those risks warrants the limitations discussed above. Petitioners do not contest the lower courts' affirmative findings on either point.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' ALLEGATIONS THAT THE FIFTH CIRCUIT "DEFIE[D]" *AMCHEM* ARE BASELESS.

Petitioners' primary contention is that this Court — less than one year after deciding *Amchem*, and in the absence even of any allegation of conflict or confusion in the lower courts as to its meaning — should take the extraordinary step of reviewing the factbound question whether the Fifth Circuit correctly applied that decision on the facts of this case. Petitioners base

* While petitioners complain about several of the "limitations" imposed by the Global Settlement (such as the $500,000 cap on damages, Pet. 6), the District Court found on the uncontroverted record that these provisions reflect tort-system realities in suits against Fibreboard. For example, the District Court specifically found that only a handful of the over 100,000 plaintiffs to have sued Fibreboard before the Global Settlement was reached had ever recovered more than $500,000 in damages against it and that the insurance policies at issue in the coverage dispute specified a $500,000 per-person limit. App. 373a. The District Court made similar express findings regarding the minimal effect of the other alleged limitations on recovery. App. 372a-374a.

this contention on wild and reckless charges of supposed "astonishing" "insubordination" by the Fifth Circuit.* These charges are baseless and do not warrant this Court's review.

1. To begin with, this Court's opinion in *Amchem* did not, as petitioners assert, "*already* reject[ ] the Fifth Circuit's application of Rule 23(a) to this settlement class action." Pet. 11 (emphasis in original). One searches *Amchem* in vain for petitioners' claimed directive that this very different class settlement must necessarily be disapproved. To the contrary:

- *Amchem* distinguished this case by name as involving a less "sprawling" settlement class, 117 S. Ct. at 2250;
- *Amchem* went on repeatedly to emphasize that it did *not* involve a Rule 23(b)(1)(B) class settlement, that its ruling was rooted in large part in peculiar concerns arising out of class certification under the very different provisions of Rule 23(b)*(3)*, and that the governing requirements would be different in cases under Rule 23(b)(1)(B). *See id.* at 2245-47, 2249 n.19.
- *Amchem* then observed that its primary ground for decision — lack of "predominance" of common issues — does *not* apply to cases "under Rule 23(b)(1)(B)." *Id.* at 2249 & n.19. And it also indicated that the intraclass conflict in that case existed precisely because the settlement purported to make "essential allocation decisions" regarding individual claimants' compensation even though it was "not a 'limited fund' case certified under Rule 23(b)(1)(B)." *Id.* at 2251.

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* Seeking to divert attention from the lack of any conflict among the lower courts as to *Amchem*'s meaning, petitioners also contend that this Court should nonetheless grant review because "this case enshrines the Fifth Circuit as venue of choice for mass tort defendants" and "other courts of appeals" will supposedly not "have an opportunity to rule" on this issue. Pet. 30. The empirical basis for this dire prediction is unclear at best. Petitioners have incanted this augury ever since this case was filed in 1993, yet are unable to cite a single similar class action settlement in any court of the Fifth Circuit in the intervening five years.

In short, *Amchem* — far from "expressly repudiat[ing]" and "reject[ing] the Fifth Circuit's" decision (Pet. 11-12) — left undisturbed that Circuit's previous conclusion that this case meets the requirements of subdivision (b)(1)(B) of Rule 23, and then distinguished Rule 23(b)(1)(B) cases from each of this Court's grounds for rejecting the *Amchem* settlement.

Indeed, petitioners suggest that the Fifth Circuit defied a direct command of this Court in *Amchem* only by unfairly tinkering with a quote from the Circuit's first (*pre-Amchem*) opinion. They attribute to the Fifth Circuit the statement that "in the settlement class context, common issues arise from the settlement itself," and present the Fifth Circuit as therefore having held that "settlement obviates or reduces the need" for scrutiny of class certification. Pet. 11-12. They then proclaim that *Amchem* rejected this supposed "holding" of the Fifth Circuit.

Inspection reveals, however, that the phrase attributed to the Fifth Circuit appears only as a parenthetical description of the view of the Newberg treatise, *not* as the Fifth Circuit's holding. App. 56a. What the Fifth Circuit did hold was that courts must "consider the settlement" and "look at the terms of a settlement" in assessing certification of a settlement class (App. 54a-56a): not, as petitioners allege, in order to pretermit the certification inquiry, but to *assist* that inquiry by allowing consideration of "important and relevant information" that "will often expose diverging interests or common issues" not otherwise evident. App. 54a-55a.* This *actual* holding is squarely in accord with *Amchem*'s recognition that a "settlement *is* relevant to a class certification," "*is* a factor in the calculus" and *cannot* be "ignore[d]" in the certification inquiry — as well as with the thorough consideration of the settlement undertaken in *Amchem* itself. 117 S. Ct. at 2248-49, 2251 (emphasis added).

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* Indeed, this holding that settlement may "expose diverging interests" — and thus may count *against* certification — belies petitioners' charge that the Fifth Circuit held that the existence of a settlement "obviates or reduces" the certification inquiry. Petitioners' charge is also at odds with the Fifth Circuit's statement that it "likely agree[d]" with the Third Circuit that — the existence of a settlement notwithstanding — the *Amchem* class (which was not yet before this Court) could not be certified because of "typicality and commonality problems." App. 58a n.8.

2. Similarly, petitioners' cries of "insubordination" find no support in the fact that the Fifth Circuit reaffirmed its prior judgment after this Court remanded this case "for further consideration in light of *Amchem*." App. 36a. Beginning with its impertinent first sentence, the petition depicts a GVR order as really being a directive for reversal rather than (as the order states) "for further consideration," and implies that certiorari is to be granted as a matter of course if a court of appeals determines upon "further consideration" that its original judgment is not affected by this Court's intervening decision. Pet. 1-2. That is simply not the case: indeed, in the past two years alone, this Court has denied certiorari at least 7 times where a court of appeals reaffirmed its original judgment after a GVR.*

Nor do petitioners' sneers about the length of the Fifth Circuit's opinion on remand — as if brevity were somehow a reversible vice — aid their cause. As noted above, the Fifth Circuit in its prior opinion had *already* detailed the distinctions between this case and *Amchem* and noted its "likely *agree-[ment]*" with the Third Circuit's disapproval of the *Amchem* settlement. *See* pp. 4-5, 7-10, *supra*. Indeed, the Fifth Circuit had there indicated its view that the *Amchem* class did not satisfy Rule 23 for the precise reason ultimately adopted by this Court: because that action — unlike this one — did nothing beyond "requesting individual damages for members of a global class of asbestos claimants" despite "the huge number of individuals and their varying medical expenses, smoking histories, and family situations." App. 57a-58a & nn.7-8; *compare Amchem*, 117 S. Ct. at 2250. It hardly amounts to "insubordination" for the Fifth Circuit (after full briefing and argument) to have restated this conclusion, in which it had cor-

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* *Anheuser-Busch v. Schmoke*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997); *United States v. Meza*, 127 F.3d 545 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1103 (1998); *Motorcity v. Southeast Bank*, 120 F.3d 1140 (11th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3704 (1998); *United States v. Knapp*, 120 F.3d 928 (9th Cir.), *cert. denied*, 118 S. Ct. 417 (1997); *Martin v. Telectronics*, 105 F.3d 1090 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 850 (1998); *McLeod v. Oregon*, 102 F.3d 376 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1823 (1997); *Feltrop v. Bowersox*, 91 F.3d 1178 (8th Cir.), *cert. denied*, 117 S. Ct. 1849 (1997).

rectly anticipated this Court's *Amchem* ruling, by cross-referencing the findings "detailed in [its] prior opinion" (App. 2a-3a) rather than by recapitulating them in full.

3. Once the petition is stripped of these baseless assertions of "insubordination," it loses even any pretense of presenting a certworthy issue. Petitioners' remaining assertions that insufficient common issues and an intraclass conflict existed on the particular facts of this case raise no question warranting review.

First, there is no merit to petitioners' argument that, because common questions did not "*predominate*" under Rule 23(*b*)(3) in *Amchem*, such questions do not *exist* under Rule 23(*a*)(2)-(3) in this case.* To the contrary, *Amchem* addressed the "far more demanding" predominance requirement on the assumption that the less-demanding Rule 23(a) "commonality requirement may be satisfied by [the] shared experience" of class members in being "exposed to asbestos products supplied by defendants." 117 S. Ct. at 2250. Accordingly, the commonality and typicality threshold is *a fortiori* satisfied here, where class members share not only that "experience," but also the central claims in this case — that they are entitled to the insurance proceeds subject to the coverage dispute. App. 3a.

Second, this case does not present the intraclass conflict identified in *Amchem* between currently injured and "exposure-only" class members. Rather than creating internal conflicts, the Global Settlement's principal provisions — securing over $1.5 billion of disputed insurance coverage to compensate the class — greatly benefit *all* class members, currently injured and exposure-only alike, since they *all* would otherwise have faced the "real and enormous" risk that a Fibreboard loss in the coverage litigation would have left each of them without any meaningful compensation at all. App. 76a, 58a. As the courts below found, this "common interest" of class members in the Global Settlement "vastly overwhelmed" and "far outweighed any divergent interest the intraclass groups may have," and "during the process of negotiations there was no competition

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* As noted above, the "predominance" requirement does not apply to this 23(b)(1)(B) class action. *Amchem*, 117 S. Ct. at 2249 n.19.

for insurance funds between [these groups of] claimants." App. 69a-70a, 421a-422a. This overriding "*common*" interest among the two groups was totally lacking in *Amchem*.*

Moreover, as the Fifth Circuit's opinion on remand recognized, this case, unlike *Amchem*, involves a class settlement under Rule 23(b)(1)(B). Although Rule 23(a)(4)'s adequate-representation requirement applies fully in Rule 23(b)(1)(B) cases, the inquiry must be informed by the type of class certification at issue. Rule 23(b)(1)(B) calls for a unitary class resolution in the relatively rare circumstance in which allowing individual class members to maintain "separate actions" seeking full recoveries on their own would "as a practical matter" prejudice *other* class members' claims. Rule 23(b)(1)(B) class actions thus *often* — by definition — involve some degree of tension within the class. Yet they have traditionally been resolved on a *unitary* basis. App. 81a-84a. The reason is that, in the narrow set of circumstances in which the Rule applies, the class's predominant interest — to secure and equitably distribute otherwise potentially unavailable funds — is a *common* one, and any "competition" for those funds is then "controlled" by the court for "the benefit of all members of the class." App. 3a. And *Amchem*, which took pains to note that the case did not involve Rule 23(b)(1)(B), says nothing to the contrary.

II. PETITIONERS' OBJECTIONS TO NON-OPT-OUT CLASS TREATMENT ARE NOT CERTWORTHY.

Citing virtually no cases, much less a conflict among the lower courts, the petition next theorizes that the certification of this class under Rule 23(b)(1)(B) transgresses Rule 23 and a potpourri of statutes. These musings do not merit review.

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* In addition, the Global Settlement also contains *none* of the specific terms found to create a conflict between the two groups in *Amchem*. There is no prohibition on inflation adjustments, which may be fully considered by the Trust; all class members have an *absolute* right to exit to the tort system; no causes of action are extinguished without compensation; and the Global Settlement does not invite tradeoffs between groups of class members by setting different compensation ranges for different groups. *Contrast Amchem*, 117 S. Ct. at 2251.

1. For all petitioners' complaints about the Fifth Circuit's alleged "shoehorn[ing]" of this case into Rule 23(b)(1)(B) (Pet. 17), they *never once* dispute that this case falls squarely within the plain language of that Rule. That language calls for a unitary resolution where allowing individual opt-outs would "create a risk" that other class members would "as a practical matter" suffer a "substantial[ ] impair[ment] . . . [of] their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). In other words, in the view of the Advisory Committee (which drafted the Rule), this Court (which endorsed it) and Congress (which passed upon it), individuals cannot opt out of a class where their doing so would substantially prejudice their fellow class members' claims. And that is exactly what the courts below found would have happened here, by creating the serious risks that all of the class would have recovered nothing via the coverage litigation or that much of the class would have recovered nothing under the Trilateral Agreement. App. 77a, 81a, 357-358a. As the Fifth Circuit put it, "[n]o one contests th[is] finding, . . . probably because it is incontestable." App. 2a.*

2. Petitioners' Rules Enabling Act contention consequently faces the presumption that the Rule's plain language does not "transgress[ ] . . . the terms of the Enabling Act." *Hanna* v.

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* Moreover, petitioners' claim that the Fifth Circuit's application of 23(b)(1)(B)'s plain language would render "*every* settlement of class claims for money damages" eligible for class treatment under that Rule (Pet. 19) is based upon a caricature of the opinion below. The Fifth Circuit did *not* certify the class on the basis of a "settlement fund" that is "limited only in the sense that literally *every* settlement is limited." Pet. 19. Rather, it recognized that, absent a unitary resolution, the class's source of recovery would potentially be lost for reasons *unrelated* to the merits of the class's claims: through a potential Fibreboard loss in the coverage litigation. App. 76a-77a. This holding, as the District Court explained, does *not* support the certification of a mandatory class "in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute" — in such a case, "if the settlement failed because [opt outs] were permitted, the defendant would retain the settlement funds (or the insurance coverage) and there might not be the 'impair[ment]' to class members' 'ability to protect their interests' required for mandatory class certification" by the language of Rule 23(b)(1)(B). App. 233a.

Plumer, 380 U.S. 460, 471 (1965). Petitioners, however, have offered nothing to overcome this presumption. They offer only the *ipse dixit* — for which they cite only out-of-context snippets of certain questions asked at oral argument in other cases — that class members have a "substantive right" to seek judgments on their individual claims "*in full*," even where their doing so would irretrievably prejudice the rest of the class's claims. They then assert that the Rules Enabling Act forbids the compromise of this supposed "right" through a mandatory class resolution that does not guarantee "full" recovery. Pet. 15-16.

This breathtaking assertion would effectively render non-opt-out class resolutions impermissible in virtually *any* Rule 23(b)(1)-(b)(2) case, contrary to settled law. Absent class members can *always* assert this supposed "substantive right" to "full" recovery: for example, to the most money or the broadest injunction or declaration an individual class member may desire. And these class members can likewise *always* complain that a mandatory class resolution that gets them less than everything they desire (as will happen inevitably in settlement and often in litigation) is an illegitimate forced compromise of this "substantive right" through the rules of procedure.

3. Seeking to mitigate these absurd consequences of their position, petitioners ultimately rest on a hair-splitting distinction that they do not even argue has any basis in the language of Rule 23(b)(1)(B) or so much as a *single* decided case. Quoting the dissent below, they insist that Rule 23(b)(1)(B)'s plain language cannot be applied here because "the purpose of the suit is to establish . . . rights and not to divide preexisting rights" (Pet. 18): in other words, a unitary resolution would have been permitted had class members' claims sought "equitable relief" in the form of "*in rem* claims" asserting a "preexisting interest" in a "fund" or "specific property," but such a resolution was somehow impermissible here because class members needed a unitary resolution in order to secure a fund to compensate them in the first place. Pet. 15, 17-18.*

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* In an attempt to create the impression that Rule 23(b)(1)(B)'s Advisory Committee Note would limit the Rule's operation in the manner they propose, petitioners selectively quote those Notes as confining

Petitioners, however, never reveal the basis for or significance of this "distinction." In particular, they offer no reason why, if each class member indeed has a "substantive right" to "full" recovery, that right can *ever* be limited in order to avoid prejudice to other class members' claims. This includes the situation petitioners posit: even where a class of plaintiffs has a "preexisting interest" in an insufficiently large "fund," each class member may have an individual claim to a 100-cents-on-the-dollar, disproportionate share of that fund. The petition is resoundingly silent as to why, if these individual rights to seek "full" recovery can be "limited" and "divided" (Pet. 18) to protect the class's overall interest, the same was impermissible here: indeed, class members here were *more* in need of a unitary resolution, since the alternative was not merely a risk of inequitable allocation of a "preexisting fund," but a risk that Fibreboard would have lost the coverage dispute and that *no* fund would have existed at all.

Moreover, far from having any basis in the law when the Rules Enabling Act was enacted in 1938, petitioners' "distinction" is belied by centuries-old settled practice which, as the Fifth Circuit explained, instead embodied the *precise* approach adopted by the plain language of Rule 23: the propriety of a unitary resolution turns on whether "equitable circumstances dictate the need for a unitary adjudication," not on whether the class is asserting "*in rem*" claims to "divide preexisting rights" in a "preexisting" fund. App. 81a-83a.*

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the Rule to "*in rem* claims 'made by numerous persons against a fund insufficient to satisfy all claims.'" Pet. 17. This carefully excises the Notes' statement three sentences later that the Rule is in fact to operate "in the *absence* of a fund either present or potential." Advisory Committee Notes to 1966 Amendment to Rule 23(b)(1)(B) (emphasis added).

* Indeed, as the Fifth Circuit explained, Rule 23(b)(1)(B) is the present-day equivalent of these traditional class actions. App. 81a-82a; *see* Advisory Committee Notes to 1966 Amendment to Rule 23(b)(1)(B) (specifically referring to *Smith* v. *Swormstedt*, discussed below, as an example of an action falling within the Rule). By contrast, Rule 23(b)(3) requires opt-out rights in those actions that would *not* have qualified for class treatment at common law because class members would not be prejudiced by allowing separate suits, but as to which current procedure allows class resolution of certain "common questions" where "convenient and desirable" to "achieve economies of time, effort and expense." Advisory Committee Notes to 1966 Amendment to Rule 23(b)(3).

For example, in *Smith* v. *Swormstedt*, 57 U.S. [16 How.] 288 (1853), this Court upheld a unitary resolution "to prevent a failure of justice" in circumstances much like those presented here: where persons with "separate and distinct" monetary claims against a pool of disputed assets brought a nationwide class suit to advance their "common interests" in establishing their joint ownership of the disputed funds and a process for equitably distributing them, but where that relief could be achieved only through a unitary resolution. *Id.* at 302-03. Likewise, unitary resolutions of monetary claims were permitted at common law where necessary to prevent "a positive denial of justice" to class members. Story, *Commentaries on Equity Pleadings*, § 100 (2d ed. 1840); *see also id.* at §§ 97-98, 120-21. And it was well recognized that the circumstances permitting a unitary resolution included suits — precisely like that here — to establish a class's joint rights to disputed assets and a process for equitably distributing them. *See Leigh v. Thomas,* 28 Eng. Rep. 201 (Ch. 1751) (mandatory class action brought by two members of the crew of a privateer ship as representatives for the entire crew to establish crew members' rights to a share of prize money); *Good* v. *Blewitt,* 33 Eng. Rep. 343 (Ch. 1807) (same).*

These cases totally belie petitioners' notion that a unitary resolution may be used only to "divide preexisting rights" to a fund, and not to "establish" those "rights" in the first place (Pet. 18): indeed, the object of the class in each of these cases was precisely to "establish" the class's joint rights to the disputed funds. These cases similarly reject petitioners' rigid code-pleading distinctions between "equitable" "*in rem* claims" and "*in personam*" claims. In *Smith*, this Court thus made clear that a court's power to achieve a unitary resolution "to prevent a failure of justice" extends to "[t]he *legal* and equitable rights and liabilities of all being before the court by representation." 57

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* Mandatory "representative suits involving money claims were adjudicated in equity as a matter of course from early times" in those circumstances where class members' claims would otherwise be prejudiced. Z. Chaffee, *Some Problems of Equity* (1950), at 285; *see, e.g., Brown* v. *Vermuden,* 22 Eng. Rep. 796 (Ch. 1676); *Brown* v. *Booth,* 21 Eng. Rep. 960 (Ch. 1690); *Chancey* v. *May,* 24 Eng. Rep. 265 (Ch. 1722); and *Adair* v. *New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805).

U.S. at 303 (emphasis added); *cf. Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312-13 (1950) (availability of a unitary resolution "do[es] not depend upon a classification" between "*in rem* and *in personam*" actions). Similarly, at common law, it was "immaterial" to the propriety of a unitary resolution whether "the basic issues [were] legal and not equitable." Chaffee, *supra*, at 156; *see also id.* at 151-52; *Adair* v. *New River Co.*, 32 Eng. Rep. 1153, 1159 (Ch. 1805) (describing the practice as allowing "a person, having at *Law* a general right . . . [to] sue thus in Equity," and as requiring only that enough of the individual class members be brought into court "that it can be said, they will fairly and honestly try the *legal* right between themselves, all other persons interested, and [the party opposing the class]") (emphasis added).

Indeed, many of these cases involved classically *in personam* claims. For example, *Smith* involved class members' assertion of "separate and distinct" legal claims of ownership of disputed funds as a matter of contract interpretation (57 U.S. at 302); *Chancey* v. *May*, 24 Eng. Rep. 265 (Ch. 1722), involved fraud claims; *Adair* involved alleged rent overpayments under a contract; and *Mullane* expressly involved *in personam* tort claims for money damages (339 U.S. at 311-14).

In short, petitioners' invented, unsupported effort to engraft an "equitable *in rem*" limitation on Rule 23(b)(1)(B)'s plain language presents neither a division of authority nor any other reason for this Court's review.

4. Finally, as the Fifth Circuit explained in detail, the application of Rule 23(b)(1)(B)'s plain language in this case conflicts neither with the Bankruptcy Code nor with *Keene Corp.* v. *Fiorelli*, 14 F.3d 726 (2d Cir. 1993). App. 74a-79a. As noted above, class members could not have put Fibreboard into bankruptcy without first forcing it to continue and lose the coverage litigation. *See* p. 11, *supra*. Their colorful rhetoric notwithstanding, petitioners never identify exactly what in the Bankruptcy Code required the class to adopt this absurd course, forcing everyone to await "catastrophe" in the coverage litigation (App. 77a) and suspending in the interim the normally available procedures of Rule 23(b)(1)(B). To the contrary, the

Bankruptcy Code expressly permits the district courts to sanction a resolution outside of bankruptcy where the relevant interests would be "better served." 11 U.S.C. § 305(a)(1).*

Keene, by contrast, was different on every level. There, a former asbestos manufacturer tried to evade an immediate and otherwise unavoidable bankruptcy through a "preemptive" mandatory defendant class action seeking to *compel* all claimants to "settle" with it where no settlement existed at all. *See id.* at 728. The Second Circuit dismissed this "suit" for lack of a case or controversy and expressly did not decide the propriety of Rule 23(b)(1)(B) certification *(see id.* at 728,730 & n.1, 733); the portion of its opinion relied upon by petitioners is, in the Fifth Circuit's words, a "gratuitous discussion" and does not amount to a conflict warranting this Court's review. App. 75a n.14. (In contrast, on the occasions that the Second Circuit has actually *decided* the issue — including one decision *subsequent* to *Keene* — it has squarely held that Rule 23(b)(1)(B) *may* properly be applied in appropriate cases involving insolvent entities. *See In re Joint E. and S. Dist. Asbestos Litig.*, 78 F.3d 764, 777-78 (2d Cir. 1996); *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721, 737-39 (2d Cir. 1992); *In re Drexel Burnham Lambert Co.*, 960 F.2d 285, 292 (2d Cir. 1992).) Even the *Keene* dictum, however, is fully consistent with the decision below. *Keene* involved a situation where, unlike here, class members *could* put the former asbestos manufacturer into bankruptcy immediately. The Fifth Circuit emphasized its agreement that, in those circumstances, "a 23(b)(1)(B) action was not appropriate." App. 76a.

III. THIS CASE DOES NOT PRESENT THE DUE PROCESS ISSUE RAISED IN *ADAMS* AND *TICOR*.

Nor does this case present the question the Court was unable to reach in *Adams v. Robertson*, 117 S. Ct. 1028 (1997), and

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* Petitioners badly distort the Fifth Circuit's opinion in contending that it relied on § 305(a)(1) as "a grant of authority" to "ignore" restrictions on its powers. Pet. 20-21. What the Fifth Circuit actually held was that this section refuted petitioners' claim that, in the circumstances of this case, the Bankruptcy Code divested the court of the *authority it otherwise possessed under Rule 23(b)(1)(B)*. The plain language of § 305(a)(1) shows that the Fifth Circuit was clearly correct in this regard.

Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994). Those cases each involved the issue whether rules of procedure may constitutionally provide for certification of a mandatory class action that "extinguished [class members'] money damages claims" where there was *no* claim by the parties that affording opt-out rights would have prejudiced those claims. *Ticor*, 511 U.S. at 119; *see Adams*, 117 S. Ct. at 1029 ("preclu[sion]" of fraud claims). Here, by contrast, petitioners do not contest that the plain language of Rule 23(b)(1)(B) calls for a unitary resolution on the facts of this case, or that many class members would be severely prejudiced and potentially recover nothing on their claims if opt-outs were instead permitted. Accordingly, unlike the novel issues in *Adams* and *Ticor*, petitioners' due process claims fly in the face of long-settled precedent, and do not warrant this Court's review.

1. Petitioners first contend that — no matter how draconian the consequences to the class — the courts are constitutionally foreclosed from achieving a unitary resolution whenever the class asserts "*in personam*" claims. Pet. 23. This contention is contrary to the historical precedents, which reject petitioners' formalistic *in rem/in personam* distinction and establish instead that opt-out rights are not required where a unitary resolution is necessary to protect the class. *See* pp. 21-23, *supra*.

Moreover, petitioners' argument is also flatly contrary to the square holding of this Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). There, this Court considered an identical due process challenge to a unitary resolution of *in personam* money damage claims arising out of alleged negligent mismanagement of a trust where such a resolution was necessary to achieve a "final settlement" of all claims involving the trust. *Id.* at 310-14.* The petitioners there likewise claimed that a unitary resolution violated their due process rights to the extent it encompassed *in personam*, as

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* Although *Mullane* was not technically a class action, it nonetheless involved a mandatory representative settlement encompassing absent and future parties from around the nation (who were represented by guardians ad litem). *See* 339 U.S. at 309-11. The Court's rejection of the due process challenge in *Mullane* is accordingly fully applicable here.

opposed merely to *in rem*, claims. The Court squarely rejected this contention, holding that "the requirements of [due process] do not depend upon [this] classification. . . . Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law . . . we do not rest the power" to achieve a unitary resolution upon "this historic antithesis." *Id.* at 312-13. Petitioners present no reason why this Court should reexamine this settled law.*

2. Petitioners' fallback position — that this Court should review whether, in a class action such as this one, opt-out rights must be given to class members "who lack minimum contacts with the forum state" — is likewise not certworthy. This contention too is contrary to settled law — as typified by this Court's prior decisions in *Smith* and *Mullane*, both of which explicitly upheld mandatory resolutions binding absent plaintiffs who lacked *any* contact with the forum state. *Mullane*, 339 U.S. at 309, 311; *Smith*, 57 U.S. at 289, 303. Nothing in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), says otherwise. As the Fifth Circuit observed, *Shutts* involved a "class action brought under a state rule virtually identical to [Rule] 23(b)(3)" (App. 81a) — that is, the class was certified merely for litigation convenience. The Court's holding requiring opt-out rights in that context therefore did not alter the settled validity, exemplified by *Smith* and *Mullane*, of mandatory nationwide class actions involving monetary claims where a need for a unitary resolution *does* exist. Indeed, the *Shutts* opinion was limited to "those class actions which seek to bind

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* Petitioners' claim of a conflict with *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994), is without merit. In that case — which was the lower court decision leading up to *Ticor* — a mandatory class was certified under Rule 23(b)(1)(A) and (b)(2) with respect to a "hybrid" action involving both equitable relief and "*foreclosure* of substantial damage claims" where there were no circumstances requiring unitary resolution of the damage claims. Putting aside whether the underlying certification of a mandatory class in that action was proper under Rule 23, it is plainly distinguishable from this case, where there was an overriding need for a unitary resolution to ensure a source of recovery for the class and in which individual damages will not be adjudicated.

known plaintiffs concerning claims wholly or predominately for money judgments" and "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief." 472 U.S. at 811-12 n.3.* Finally, there is no conflict on this point with *In re Real Estate Title*, 869 F.2d 760 (3d Cir. 1989). To the contrary, that case arose out of the same "hybrid" class action that eventually gave rise to *Ticor*, in which there was likewise no need for a unitary resolution; the Third Circuit thus specifically noted that its decision did not "address the due process requirements in a class action certified under Rule 23(b)(1) in which there is only a limited common fund from which the plaintiffs can obtain relief." *Id.* at 768 n.8.

IV. THE NOTICE ISSUE IN *AMCHEM* IS NOT PRESENTED HERE.

Petitioners' one-paragraph notice argument is based entirely on the notion that *Amchem* "recognized" the importance of the notice "issue" in this case. Pet. 25. It did not. Instead, the question this Court "recognized" in *Amchem* regarding notice to a futures class was in the context of a Rule 23(b)(3) case, in which class members needed to make immediate, front-end opt-out decisions. Accordingly, this Court specifically stated that its concern was whether current notice could provide unknown or future claimants with "the information . . . needed to decide, intelligently, whether to *stay in or opt out*." *Amchem*, 117 S. Ct. at 2252 (emphasis added). This concern plainly has no appli-

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* As the Fifth Circuit explained, far from invalidating Rule 23(b)(l)(B)'s plain language, *Shutts* thus recognized the basic distinction made in Rule 23: unitary resolutions are permitted of those actions that fall within the federal courts' authority to fashion "equitable relief" to protect the class — class actions under Rules 23(b)(l)-(b)(2), which are the present day equivalents of the traditional equitable class action. App. 81a-83a & n.16. In addition, *Shutts* is also distinguishable for two further reasons: (1) its holding was expressly limited to class actions involving "known plaintiffs" (472 U.S. at 811-12 n.3), and thus by its terms has no applicability to this futures class action. (2) *Shutts* involved a class action brought in *state* court, and has no bearing on this *federal* class action. Whereas state courts can ordinarily assert jurisdiction only over parties having minimum contacts with the state, the Constitution permits federal courts to assert jurisdiction nationwide. *See, e.g., United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 604 (1878).

cability to a Rule 23(b)(1)(B) class such as this one in which no opt-out decision is involved. Instead, it is well-settled that — at least where no opt-out decision is involved — in the case of "conjectural or future" claimants the Constitution requires only provision of the best notice "reasonably possible or practicable," because "in the case of persons missing or unknown, employment of an indirect or even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane*, 339 U.S. at 317.* As the District Court found (App. 452a-456a), and as appellants do not contest, the best notice "reasonably possible or practicable" was clearly provided here.

V. PETITIONERS' CONTRIVED ARTICLE III CLAIMS DO NOT WARRANT REVIEW.

The Article III "issues" raised in the petition are at odds with settled law and do not warrant review. Notwithstanding petitioners' derision of this case as a "feigned proceeding" and a "contrivance among friends" (Pet. 26-27), there can be no dispute that there was a real controversy among the class, Fibreboard and the insurers before the Global Settlement was reached. App. 86a-88a. Instead, petitioners' rhetorical flourishes all boil down to this: they contend that this indisputably real controversy was transformed into an unconstitutional "contrivance among friends" because the terms of a settlement were reached prior to the filing of the complaint, and the action was then "filed to obtain judicial approval of [the] settlement." Pet. 27.

Settled law has dismissed this proposition ever since this Court's decision in *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928), rejected an identical Article III objection to a con-

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* Based on this settled law, moreover, the courts routinely decide non-opt-out class action suits involving claims on behalf of unknown, future claimants — such as future schoolchildren, future housing tenants, future employees and future prisoners. *E.g.*, *Missouri v. Jenkins*, 495 U.S. 33, 37 n.2 (1990); *County of Riverside v. McLaughlin*, 500 U.S. 44, 49 (1991); *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 193 (1991). Similarly, as the Fifth Circuit noted, Rule 23(b)(1)(B) class actions "often involve unknown or unavailable claimants" and "bind[ ] future, contingent and unknown claimants." App. 84a.

sent decree that was likewise reached prior to the filing of a complaint and was then presented to the District Court for approval concurrently with the filing of a complaint. *Swift*'s holding has been uniformly applied by the courts of appeals, and such consent decrees (and related settlements such as pre-packaged bankruptcies) have become a regular practice allowing parties to resolve their differences without first instituting often compromise-inhibiting litigation while at the same time not forfeiting potential judicial oversight of issues that may arise.* There is no reason for the Court to revisit this issue.

Nor is there any plausible distinction of *Swift*. Indeed, *Swift*'s holding applies *a fortiori* in this class action context, because Rule 23(e) affirmatively *requires* court approval of class settlements. For this reason, this Court has held that the existence of a class settlement does not end an Article III controversy until approval is received. *Havens Realty v. Coleman*, 455 U.S. 363, 371 n.10 (1982). And the effect of petitioners' argument on class actions would be absurd. In addition to invalidating the practice of consent decrees and pre-packaged bankruptcies, petitioners would institute a regime in which potential class litigants could not even talk prior to litigating, for if such talk led to a settlement before a complaint were filed, Article III would bar them from getting the necessary approval.

Equally without merit is petitioners' alternative argument (Pet. 28-29) that the "exposure only" class members lack injury in fact. This contention centers on the remarkable assertion that persons exposed to asbestos have no justiciable interest in pursuing an action designed to ensure that funds remain available to them when they subsequently contract asbestos-related diseases. For that is what this action does: as the Fifth Circuit put it, this case "does not purport to make any determination of the validity or amount of" exposure-only class members' claims; instead, it "address[es] the immediate and important controversy of whether [they] will be able to receive compensation for their injuries before Fibreboard runs out of money." App. 85a.

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* *See, e.g., SEC v. Randolph*, 736 F.2d 525 (9th Cir. 1984), *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *see also* 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3530, at 320.

Petitioners' notion that Article III prevents exposure-only class members from protecting themselves in this regard until their injuries appear years later — by which point the potential funds to compensate them may no longer exist — is totally at odds with settled law. *Duke Power v. Carolina Environmental Study*, 438 U.S. 59, 72-74 (1978); *In the Matter of UNR Industries*, 20 F.3d 766, 769 (7th Cir.); *In re Agent Orange*, 996 F.2d 1425, 1433-38 (2d Cir. 1993). And petitioners' refrain that these class members potentially could not as of this moment recover money damages under state law is beside the point: they brought this action not to recover damages now, but to ensure the availability of funds when they do develop indisputably compensable injuries. They unquestionably have standing to do so. *See, e.g., UNR Industries*, 20 F.3d at 770.*

Finally, petitioners' argument that future claimants lack standing to protect rights they will develop in the future is impossibly overbroad. A partial list of the settled practices it would invalidate includes: the payment and discharge of future claims in bankruptcy (*e.g., UNR Industries*, 20 F.3d at 770-71); actions brought on behalf of unborn heirs or those with future or contingent interests, such as those regarding trusts (*e.g., Mullane*, 339 U.S. at 316-17); actions to impose equitable receiverships or constructive trusts for the benefit of future victims (*e.g., In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992); and class actions on behalf of future prisoners, future schoolchildren or future housing tenants (*see* p. 28n.*, *supra*). The decision below thus (again) rests on settled law, and there is no warrant for further review.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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* Moreover, petitioners' cite no authority for their claim that exposure-only asbestos plaintiffs cannot recover money damages immediately. To the contrary, exposure-only claims *are* permitted in many states — including California, where Fibreboard is subject to personal jurisdiction. App. 252a; *Potter v. Firestone*, 863 P.2d 795, 816 (Cal. 1993); *Miranda v. Shell Oil Co.*, 15 Cal. Rptr. 2d 569 (Cal. App. 1993).

Dated: May 18, 1998

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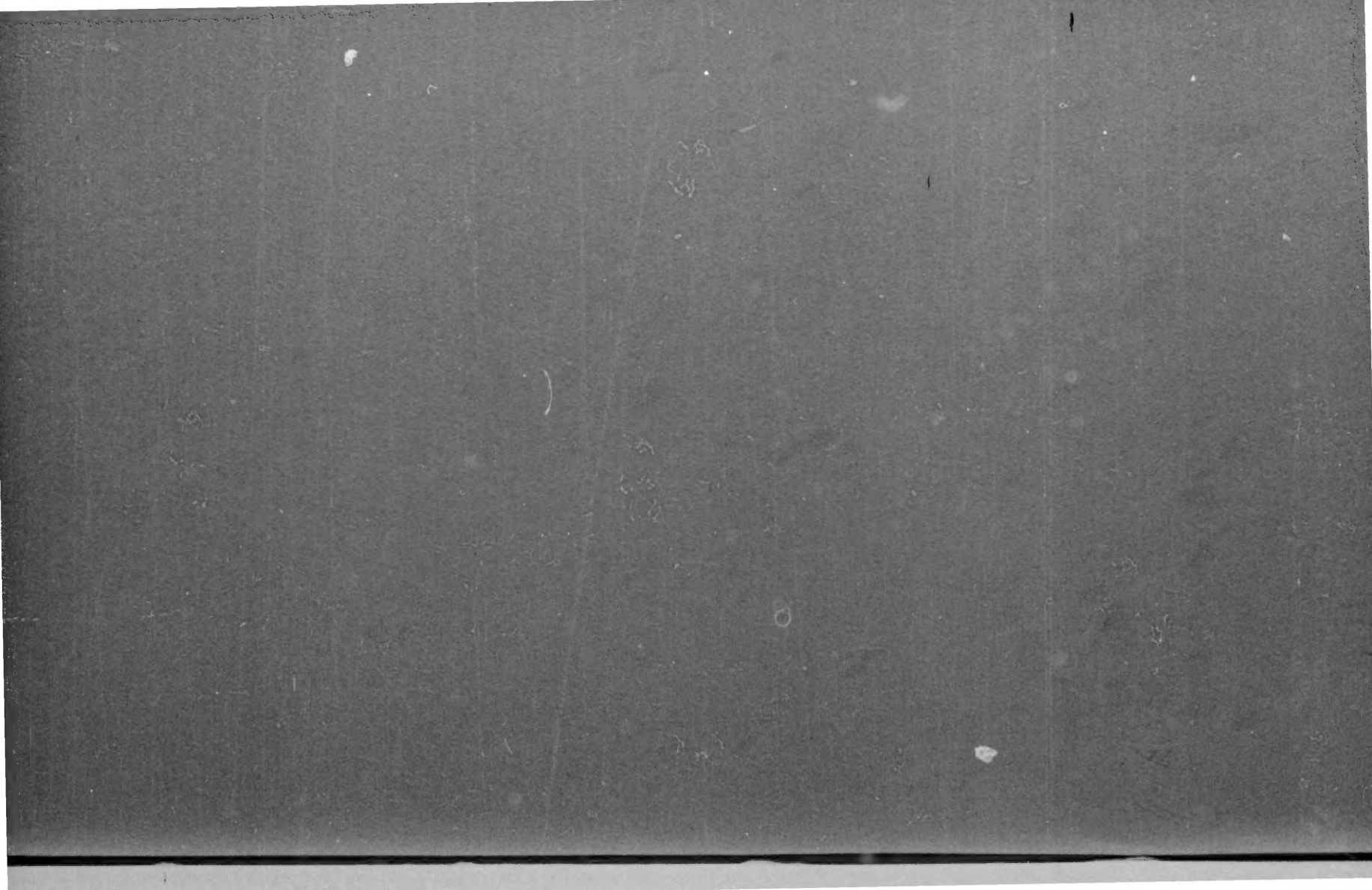

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Nos. 97-1704 and 97-1695

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ESTEBAN ORTIZ, *et al.*,
Petitioners,

v.

FIBREBOARD CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT CLASS REPRESENTATIVES GERALD AHEARN, *ET AL.*

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PARTIES TO THE PROCEEDING

The parties to the proceeding are accurately described in the petition except that James Drake and Juanita Drake are not plaintiff class representatives (and, indeed, as far as respondents are aware, were not parties below) and William Mitchell is an additional class representative and a respondent herein.

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COUNTER-STATEMENT OF THE CASE[1]

This is the *Ahearn* case not the *Amchem* case, although one could not tell that from the two petitions for certiorari filed herein. To transmute the one into the other as they must to support their arguments urging certiorari, petitioners assiduously ignore the *Ahearn* factual record and grossly mischaracterize the fundamental controversy among the parties that drove *this* settlement, caused the District Court and the Fifth Circuit to approve it, and caused the Fifth Circuit to reaffirm it on remand from this Court after *Amchem* was decided.

To say that petitioners ignore the factual record is not hyperbole. The Flanagan petitioners do not even print the District Court's Findings of Fact and Conclusions of Law in their appendix; although the Ortiz petitioners print both, they never refer to either. Petitioners do not contend that any specific factual findings of the District Court were clearly erroneous or that the Court of Appeals erred in failing to so hold. Rather, petitioners simply revise the facts as needed to make their arguments sound legal rather than factual in nature.

As described at length in the District Court's findings, this dispute and its resolution are very different from *Amchem*. This 1993 settlement arose out of a 14-year

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[1] This brief is being filed on behalf of respondents Gerald J. Ahearn, James R. Dennis, Charles W. Jeep, William J. Mitchell and James Ellison (collectively the "class representatives") in opposition to the petition for certiorari filed on behalf of Esteban Ortiz, *et al.* (cited as "Pet."). Respondents are not filing a separate brief in opposition to the petition for certiorari filed by James Flanagan and David H. Middleton (No. 97-1695) in this case, but the arguments contained in this brief are equally applicable to the Flanagan petition. Citations to the Appendix ("App. __") are to the appendix to the Ortiz petition.

insurance coverage litigation between Fibreboard and its insurers, Continental and Pacific (the "coverage case"). App. 266a-270a. Depending on the resolution of that litigation, either Fibreboard would have virtually unlimited insurance for its asbestos liabilities (App. 268a) or Fibreboard would be hopelessly insolvent — its existing $235 million enterprise value dwarfed by the more than $1.2 billion of outstanding settlement obligations it had already incurred by the end of 1992. App. 303a, 377a. Thus, as of 1993, compensation not yet paid to persons exposed to Fibreboard's asbestos-containing products for their resulting injuries (whether already manifested or to occur in the future) was completely at the risk of an unfavorable outcome in the coverage case. App. 272a-276a, 357a-358a.

Class counsel were aware of the enormity of this risk. They had been separately representing individual plaintiffs against Fibreboard for over a decade in thousands of cases that were resolved either for partial payments, coupled with promises to pay the balance in the future when and if insurance funds were available, or by assignments of Fibreboard's disputed insurance rights against Continental. App. 277a-279a, 285a-288a. Those settlements with Fibreboard included a 1992 multi-state assignment settlement (aggregating thousands of separate pending cases), executed over the objection of Continental, that was led by two of class counsel from the Ness Motley firm. Litigation of the validity and enforceability of that assignment settlement against Continental was commenced before the District Court in early 1993 and subsequently resolved by a modification of the settlement acceptable to Continental that was submitted to the District Court for fairness approval. App. 302a-303a, 317a-319a. Also, for two years beginning in early 1991, class counsel had been negotiating with Fibreboard a possible global insurance assignment settlement involving a class of all

present and future claimants. By the spring of 1992 those negotiations had proven to be unworkable. App. 291a-302a.

By the time Fibreboard and Continental jointly reopened settlement negotiations with class counsel following Judge Parker's approval of the modified Ness Motley settlement on August 9, 1993, class counsel, Fibreboard and Continental were all faced with imminent argument and decision in the California intermediate appellate court of the critical issues in the coverage case. App. 270a, 330a-331a. Fibreboard and Continental had previously proven themselves unable to settle the insurance dispute because, among other things, Fibreboard was unwilling to accept any amount in settlement that would not, in its judgment, cover its entire asbestos exposure to existing and future claimants whose claims were potentially covered by the Continental and Pacific policies together with the costs of defending all those claims in the tort system. App. 301a-302a, 329a-330a; Tr. 604, 1378. For Fibreboard, a settlement anywhere short of that goal was little better than losing the coverage case since it would lead, inevitably, to bankruptcy. Conversely, Continental was unwilling to offer an amount large enough to satisfy Fibreboard since to do so would have represented capitulation, notwithstanding the many defenses to coverage that Continental was asserting.[2]

Faced with the choice of watching Fibreboard and Continental roll the dice, and thereby risking the total loss of any prospect of meaningful recovery for the tens of thousands of class members holding potential asbestos-related claims

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[2] Pacific had entered into a separate settlement with Fibreboard in 1992 that provided up to $330 million that could be used to pay so-called post-1959 claims – claims that were otherwise uninsured. Payment of the bulk of the funds in that settlement – some $225 million – was conditioned on barring Continental's contribution claims against Pacific based on their mutually overlapping pre-1959 insurance. App. 282a-285a.

against Fibreboard, class counsel agreed in August 1993 to reopen negotiations with Continental and Fibreboard, joined subsequently by Pacific, for a three-way non-opt-out settlement of all insurance coverage issues. App. 321-322a, 325a-326a. By August of 1993, these issues included not only those raised in the coverage case itself but the question whether, assuming that coverage was otherwise available, Fibreboard's previous assignment settlements were enforceable against Continental or whether they constituted a breach of Fibreboard's insurance contract with Continental, thereby potentially forfeiting Fibreboard's coverage rights under the policy. App. 228a. This separate issue was being concurrently litigated in the *Andrus* case in California in which one of class counsel was involved. App. 198a, 288a-290a; *see also* Fib. Trial Ex. 304.[3]

These insurance coverage issues posed monumental risks to the class of persons holding potential asbestos claims against Fibreboard. As the testimony at the settlement fairness hearing detailed, there was a substantial possibility that the California appellate courts would significantly roll back Fibreboard's trial court victory in the coverage case. App. 275a-276a. Indeed, a California intermediate appellate court subsequently held, in *Andrus*, that the Fibreboard assignment settlements were breaches of its agreements with Continental. App. 379a-380a.

It was under these circumstances that an agreement in principle to a $1.535 billion global settlement (the "Global Settlement") was reached among the parties on August 27,

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[3] Also at issue was whether Continental was entitled to contribution from Pacific – an issue being litigated in a separate action before Judge Parker involving the Ness Motley settlement. App. 303a. This latter issue was ultimately settled between Pacific and Continental in the course of the August 1993 multi-party global negotiations. App. 325a-326a.

1993, on behalf of a class of persons who had been exposed to Fibreboard asbestos products but who had not yet filed suit against Fibreboard. App. 329a-331a.

In addition, as further protection for the class's need for a resolution of the insurance risk, class counsel insisted as a condition of the Global Settlement that the insurers and Fibreboard negotiate and agree to a separate back-up settlement of the insurance disputes (the "Trilateral Settlement") against the eventuality that, for any reason, the Global Settlement could not receive court approval. App. 329a-330a. Fibreboard objected to this condition because Continental declined to pay any more in the Trilateral Settlement for future claims than the $1.525 billion it had agreed to pay for those claims in the Global Settlement.[4] App. 330a. Fibreboard's objection was based on the fact that, were the Trilateral Settlement ever to become operational, Fibreboard would have much less money to pay claimants because it would incur hundreds of millions of dollars of defense costs in litigating future claims in the tort system — costs that would be altogether eliminated under the Global Settlement. App. 330a, 362-365a.

As a result of Fibreboard's concern about its potential financial exposure under the Trilateral Settlement, it took from August 27 to October 12, 1993, for Fibreboard and the

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[4] Continental did agree to pay an additional $475 million in the Trilateral Settlement to cover claims of persons who had already filed lawsuits against Fibreboard, but not yet settled or gone to judgment in those cases as of August 23, 1993. This group of persons was not included in the class involved in the Global Settlement. App. 354a-355a, 552a-575a. Because the class of claimants covered by the Trilateral Settlement includes this large group of additional persons, petitioners' statement that the Trilateral Settlement provides "half a billion *more*" than the Global Settlement (Pet. 4) compares apples and oranges and is extremely misleading.

insurers to reach a definitive written agreement on the Trilateral Settlement. App. 332a-335a. In the meantime, on September 9, 1993, class counsel had filed the complaint against Fibreboard that initiated the *Ahearn* class action, the insurers had intervened, and all parties had jointly requested certification, for settlement purposes only, of a non-opt-out class pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure. App. 334a.

Following execution of the Trilateral Settlement on October 12, 1993, the parties began negotiations of the definitive written Global Settlement agreement, including, in particular, the negotiation of the Trust Distribution Process ("TDP"). The TDP set forth the procedures by which individual class members would obtain resolution and payment of their claims against Fibreboard, which claims in turn would be channeled to the trust created by the Global Settlement. App. 346a-347a, 583a-621a. Those negotiations were not finally completed, and the Global Settlement agreement and related documents (including the TDP) were not executed, until December 23, 1993. App. 335a-336a. Thereafter, the settlement approval process, which is now before the Court, commenced. During the course of an eight-day settlement hearing before the District Court, neither the Ortiz petitioners, the Flanagan petitioners, nor any other class members contested the fairness of the settlement amount.

Notwithstanding the foregoing undisputed facts of record, petitioners try to portray this case as an attempt by venal plaintiffs' lawyers to aggregate the unaccrued personal injury claims of a disparate class of mostly uninjured persons into a cheap settlement with a wealthy asbestos manufacturer that illegitimately sacrifices class members' legal and constitutional rights to prosecute their individual tort claims as they choose. As an added embellishment, petitioners mischaracterize the claims-handling procedures established by

the TDP as a form of legislative alternative dispute resolution being inflicted on the class by the District Court and the Fifth Circuit. From those two entirely false factual premises, virtually all their legal arguments flow.[5]

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION IN THIS CASE IS NEITHER CONTRARY TO NOR INCONSISTENT WITH *AMCHEM*

Petitioners urge certiorari on the theory that the Fifth Circuit, on remand from this Court, refused to follow *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997). First, petitioners assert that the Fifth Circuit failed to follow *Amchem* by using the settlement itself as the basis for its determination that the commonality and typicality requirements of Rules 23(a)(2) and (a)(3) were satisfied. Second, petitioners claim that the instant case involves the same conflict of interest between two groups of class members that this Court held in *Amchem* precluded satisfaction of the adequacy of representation requirement of Rule 23(a)(4). Pet. 11-15. Neither of these arguments has any basis in fact or law and there is no conflict with *Amchem*.

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[5] The record in this case is extensive, although one would not know it from reading either the petitions or Judge Smith's dissenting opinions on which petitioners heavily rely. After hearing all the evidence presented at an eight-day evidentiary hearing (which was preceded by massive discovery taken by petitioners), the District Court resolved a number of factual disputes in the course of approving the Global Settlement. Petitioners do not challenge the proposition that the District Court's resolution of these factual disputes is subject to review for clear error, not appellate *de novo* review. Rule 52(a), Fed. R. Civ. P.; *Anderson v. City of Bessemer*, 470 U.S. 564, 573-76 (1985).

1. In *Amchem*, this Court noted the wide variety of factual and legal questions presented by the class members' individual personal injury claims, and it accordingly held that the class action settlement failed to satisfy the requirement of Rule 23(b)(3) that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." 117 S. Ct. at 2249-50. In analyzing that issue, the Court stated that the common questions required by both Rule 23(a)(2) and Rule 23(b)(3) for class certification may not be established solely by reference to the class members' common interests in obtaining a settlement determined to be fair under Rule 23(e). Rather those questions, as well as the requirement of Rule 23(a)(3) that the claims of the class representatives be typical of those of the class, must be identified and evaluated by reference to "the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Id.* at 2249.

In an effort to make this case resemble *Amchem*, petitioners assert that the Fifth Circuit "refused to assess class certification in terms of the legal or factual questions in the complaint . . . and instead purported to find Rule 23(a) commonality and typicality in the class members' supposed 'common interest' in seeking 'equitable distribution of compensation' under the settlement." Pet. 12-13. This contention grossly mischaracterizes what the Fifth Circuit did.

As both courts below recognized, the principal controversy resolved by the Global Settlement was whether class members would or would not be entitled to receive compensation for their existing or future personal injury claims against Fibreboard out of the only assets available to pay such claims — the insurance policies of Continental and Pacific. App. 58a, 276a. The availability of insurance coverage under those policies was already being litigated both

in the coverage case by Fibreboard and the insurers (App. 266a-276a) and in the *Andrus* case by some individual plaintiffs, Fibreboard and Continental (289a-290a, 379a-380a).

Those insurance disputes, which long preexisted this settlement, presented a tremendous risk to all class members and could only be resolved on a class-wide basis. The class's unitary need for a favorable resolution of the insurance disputes was pled in the complaint and, if necessary, could have been litigated by the class to judgment in an action against the insurers and Fibreboard. *See* pages 27-29, *infra*. The legal and factual questions presented by the insurance disputes thus "preexist[ed] any settlement" and "qualif[ied] each class member's case as a genuine controversy" (*Amchem*, 117 S. Ct. at 2249). All of these questions were common to the class, the class representatives' claims with respect thereto were typical of the class, and resolution of those questions was the primary accomplishment of the Global Settlement. App. 357a-358a, 415a.

It was by reference to *these* legal and factual disputes that the Fifth Circuit determined satisfaction of the "commonality" and "typicality" requirements of Rule 23(a), precisely as *Amchem* mandates. In its initial opinion, the Fifth Circuit repeatedly referred to the class members' common interest in eliminating the risk posed by the insurance coverage litigation in holding that the commonality and typicality requirements of Rule 23(a) were met. App. 56a-58a. Indeed, the court expressly distinguished the Third Circuit's decision in *Amchem* (then known as *Georgine*) on the basis that the instant case involves commonly held questions involving insurance coverage. App. 58a n.8. On remand, the Fifth Circuit referred to its prior opinion in reiterating its conclusion that the Rule 23(a) requirements were satisfied here. App. 2a-3a. There is thus no basis whatsoever for

petitioners' assertion that the Court of Appeals used the settlement itself as the basis for its "commonality" and "typicality" determinations.

2. Petitioners next contend that the Fifth Circuit has refused to follow a supposed *per se* rule of law established by this Court in *Amchem* to the effect that a material conflict always exists between "currently injured" and "exposure-only" members of a single class of mass tort victims. Pet. 13-15. In fact, the conflict identified in *Amchem* did not result from application of any *per se* rule, but from a concrete divergence of interests among the two groups that was created by the particular terms of the *Amchem* settlement. 117 S. Ct. at 2251. The Fifth Circuit correctly held that no similar conflict exists in this case because the factors cited by the Court in *Amchem* as evidencing such a conflict are totally absent here.

The settlement in *Amchem* established "a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements." 117 S. Ct. at 2240. The settlement, which was to be administered by the settling defendants themselves, listed four categories of compensable disease and specified the range of compensation payable for each category, without any adjustment for future inflation. The settlement also provided limits on the total number of claims payable for each disease in a given year and provided that specified categories of claims (otherwise cognizable under applicable state law) would receive no compensation at all. Class members were bound to the settlement in perpetuity, whereas defendants could withdraw after ten years. Finally, a few class members per year could opt out of the settlement and pursue their claims in court (although claims for punitive damages or increased risk of cancer were then barred). 117 S. Ct. at 2240-2241.

Since there was no fixed settlement amount to be divided among the class members in *Amchem*, there was no need for an equitable allocation of the settlement. Rather, this Court discerned a conflict between the currently-injured and exposure-only class members because the settlement itself made "essential allocation decisions designed to confine compensation and to limit defendants' liability" in a manner that materially affected the two groups differently. 117 S. Ct. at 2251. In particular, the Court emphasized the absence of an inflation adjustment for the fixed amounts payable for claims far into the future; the stringent limits on the number of class members who could take their individual claims to the tort system if dissatisfied with the settlement amounts offered them (the "back-end opt-outs"); and the total elimination of class members' loss-of-consortium claims for no compensation. 117 S. Ct. at 2251. Notwithstanding the differential impacts of these provisions on the two groups, they were not separately represented in the settlement negotiations. This Court accordingly upheld the Third Circuit's conclusion that neither the terms of the *Amchem* settlement nor the structure of its negotiations provided sufficient assurance that a single set of class representatives had adequately understood and addressed the identified conflicts. *Ibid.*

In assessing whether class members' interests meaningfully conflict, the contrast between *Amchem* and the instant case is stark. First, neither the currently-injured nor the exposure-only class members in *Amchem* faced any insurance coverage or other unitary risk that their claims would not be paid. Here, the members of both groups of the *Ahearn* class shared an identical need to eliminate Fibreboard's insurance coverage risks: absent a favorable resolution of those controversies, the claims of both groups against Fibreboard were equally worthless. App 357a-358a.

This gave the currently-injured and exposure-only class members in *Ahearn* a community of interest that was totally absent in *Amchem*.

Second, the structure and terms of the Global Settlement here include none of the aspects of the *Amchem* settlement on which the Third Circuit and this Court based their findings of a material conflict between currently-injured and exposure-only class members. The TDP does not fix the amounts to be paid for any particular category of class member claims; rather, it permits those amounts to fluctuate in response to developments in the tort system. Moreover, individual class member claims will be paid from a settlement fund that will be invested and grow over time. For both reasons, there is no need here for an inflation-adjustment provision to protect exposure-only class members, in contrast to the situation in *Amchem*. Similarly, the Global Settlement imposes no limits at all on the number of class members who can exercise back-end opt-outs to the tort system if dissatisfied with the settlement trust administrators' evaluation of their individual claims. App. 346a, 584a. Finally, there is in the instant case no set of class member claims, like the loss-of-consortium claims in *Amchem*, that are extinguished by the settlement for no compensation. Instead, subject to certain relatively inconsequential limitations applicable to all class members (discussed below), the claims-processing and distribution scheme established by the TDP allows each class member to resolve his or her claim, through litigation in state or federal court if necessary, for any amount to which the class member can establish entitlement under applicable law, in whatever jurisdiction the claim can properly be brought. App. 346a, 583a-621a.

Third, in sharp contrast to *Amchem*, the limitations on which petitioners base their conflict claim here — the elimination of punitive damages, a $500,000 cap on individual

recoveries, and the absence of pre-and post-judgment interest (Pet. 8, 16) — apply to all class members equally. There is no differential impact on currently-injured and exposure-only class members, as there was in *Amchem*. The limitations seized on by petitioners, moreover, have relatively minor real-world significance in this case, and they are clearly appropriate for ensuring an equitable division of a settlement fund that is not large enough to guarantee full payment over a period of many years for all the claims that class members might potentially assert against it. App. 372a.[6]

Finally, petitioners do not suggest, and there is no record evidence of, any conflict between currently-injured and exposure-only class members concerning the *amount* of the settlement ($1.535 billion). Because the amount was fixed, some equitable mechanism necessarily had to be established for allocating this money among class members. That mechanism was embodied in the TDP, a component of the

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[6] Punitive damages were almost never obtained historically against Fibreboard (App. 261a, 372a-373a) and, in any event, would constitute an unfair windfall to any class member recovering them from a settlement fund such as this whose goal is to allocate the settlement amount to compensate all class members equitably for their personal injuries.

Individual judgments against Fibreboard in excess of $500,000 had been exceedingly rare, and the insurance policies that constituted the only resource for paying claims of this magnitude contained $500,000 per person limits. App. 267a, 373a. Petitioners complain that the $500,000 cap is too low and thus favors exposure-only class members at the expense of the currently-injured (Pet. 16), while Judge Smith suggests that the cap is too high thus hurting exposure-only class members for the benefit of the currently injured (App. 26a). Such a disparity of views hardly supports the existence of a substantial conflict between the two groups on the point.

Finally, the elimination of pre- and post-judgment interest was relatively inconsequential in light of the District Court's unchallenged finding that claims against the settlement trust would likely be resolved and paid more quickly for most class members than in the tort system. App. 373a-374a.

Global Settlement that was negotiated months after the $1.535 billion settlement had been agreed upon in principle and announced publicly. App. 335a-336a, 346a-347a. Thus, even if petitioners were correct in asserting a meaningful conflict among class members as to *allocation* of the settlement amount, that conflict (in contrast to the situation in *Amchem*) would not justify reversing the lower courts' approval of the *overall settlement*. At most, it would justify a remand for the limited purpose of creating subclasses to renegotiate, and litigate if necessary, the detailed provisions of the TDP. *See* App. 148a. This is a wholly fact-bound question that does not warrant this Court's review.

3. Although the recovery limitations contained in the TDP apply equally to members of the currently-injured and the exposure-only groups, and are relatively inconsequential to boot, petitioners complain vociferously that the rights of the currently injured to immediate and full payment for their individual claims are being unfairly restricted. Pet. 13, 16. This is assertedly so because one purpose of those restrictions is to ensure the availability of funds to pay, on a fair and comparable basis, the later-filed claims of exposure-only class members who manifest their compensable injuries in the future. This argument boils down to an assertion that *any* restriction contained in this insurance settlement on the ability of currently injured class members to receive the maximum amount they could have obtained — assuming insurance coverage — in a race to judgment in the tort system created a *per se* conflict with exposure-only class members requiring the creation of separately represented subclasses. There is no basis in law or logic for any such *per se* rule.

Virtually every settlement of a class action is for an amount less than 100% of class members' potential aggregate claims — that is why it is a settlement and not a litigated judgment. And every settlement for less than 100% of such

claims will by definition require an equitable allocation of the settlement amount among the settling class members to ensure parity of treatment. The *per se* rule advocated by petitioners would require the creation of subclasses to negotiate this allocation in every case where one group of class members could plausibly contend that, absent a class settlement and any requirement for an equitable allocation thereof, they could win a race to judgment with another group of class members and thereby demand preferential treatment on their claims out of the settlement fund. This would be true (for example) in the common situation where some class members have individual suits already pending while others, prior to class notice, have not yet filed suit or may be unaware that they even have claims to assert. In making this argument, petitioners ignore both the inequity of the result they seek and the absence of any legal basis for their claim for preferential treatment.[7]

That this Court in *Amchem* intended to establish no general rule requiring subclassing whenever one group of class members has a superior shot at winning a race to judgment is demonstrated by the Court's favorable citation of the Manville Trust case, *In re Joint Eastern and Southern*

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[7] In any Rule 23(b)(1)(B) case where the limited fund pre-existed the settlement, petitioners' theory would require subclasses from the beginning for each and every group or individual within the class who could plausibly claim an ability to recover in full on his claim prior to exhaustion of the fund. The number of subclasses that could be sought in a limited fund tort case would be limited only by the imagination of the lawyers involved. For example, some class members could assert, using statistics, that cases brought in one jurisdiction will go to judgment faster than cases brought in others. Such arguments for subclassing would be totally inconsistent with the fundamental purpose for creating Rule 23(b)(1)(B) and applying it in limited fund cases, *i.e.*, to eliminate the adverse impact on some class members resulting from other class members' winning the race to judgment and exhausting the fund.

Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992), *modified on reh'g sub nom. In re Findley*, 993 F.2d 7 (2d Cir. 1993). *See* 117 S. Ct. at 2251. In that limited fund case, the Second Circuit initially held that subclasses were required for two groups of class members that, as result of the order-of-filing priority (the "FIFO queue") governing processing of claims created by the claims resolution procedures of the now-insolvent Manville Trust, had conflicting interests arising from the first group's ability to be paid in full, thereby exhausting the funds available to pay the second group. 982 F.2d at 741-42.

On rehearing, however, the Second Circuit reversed its decision on this point and held that subclasses were not required for the two groups because, correctly interpreted, the Trust documents did not establish a payment priority that "created legally enforceable rights." 993 F.2d at 10. In the absence of such legal entitlement, the mere fact that the group of class members at the head of the FIFO processing queue would as a practical matter have occupied a favored position vis-a-vis the remaining class members was not sufficient, according to the Second Circuit, to require subclasses for the two groups. 993 F.2d 10-11. Here, petitioners can show no legally enforceable right for preference to be given to the claims of the "few class members who had already developed an asbestos-related disease" (Pet. 5) over the claims of the exposure-only class members. Despite petitioners' suggestions to the contrary (Pet. 15, 17), neither the Rules Enabling Act, 28 U.S.C. § 2072, nor the Rules of Decision Act, 28 U.S.C.

§ 1652, even purports to create substantive legal rights governing the entitlement of tort plaintiffs to recover on their claims in any particular order of priority.[8]

4. Although this issue is not included in petitioners' Questions Presented and the argument with respect to it is buried in a footnote (Pet. 14 n.7), respondents feel obligated to address petitioners' wholly unwarranted, but incendiary, contention that class counsel had a conflict of interest arising out of the prior settlement of individual cases. Petitioners base this contention on the assertions that (i) class counsel were "simultaneously" negotiating the class action and the separate settlement of their individual clients' cases (Pet. 14 n.7), (ii) those individual settlements were "for higher-than-average amounts" (Pet. 8), and (iii) those individual settlements were "*contingent on the approval of a global settlement - on any terms - of all future claims against*

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[8] There is no merit to petitioners' footnote assertion (Pet. 14 n.7) of a conflict between pre-1959 and post-1959 class members. The uninsured status of post-1959 class members had been eliminated long before the TDP was negotiated by three separate events. First, as a result of the Pacific agreement, by the end of 1992 Fibreboard had up to $330 million of insurance available to pay post-1959 claims. App. 284a-285a. Second, in the April 9 Agreement Continental agreed to fund any global settlement that it and Fibreboard could negotiate with Fibreboard's asbestos personal injury claimants without regard to whether such claimants had pre-1959 or post-1959 claims. App. 308a-310a. Third, the back-up Trilateral Agreement entered into between Fibreboard, Continental and Pacific on October 12, 1993, provided a fund that Fibreboard could use to pay both pre-1959 and post-1959 claims without distinction. App. 334a-335a, 354a-355a. Thus, when the settling parties negotiated the TDP after October 12, 1993, there was no basis on which anyone purporting to represent pre-1959 class members could have reasonably contended that pre-1959 class members should receive higher payments for equivalent claims than post-1959 claimants. The dissent's assertion to the contrary below (App. 415a-418a) has absolutely no support in the record.

Fibreboard" (Pet. 8, emphasis in original). Each of these assertions is either incorrect or misleading.

First, at the suggestion of Circuit Judge Higginbotham, acting as a mediator, the parties deferred negotiation of the Global Settlement until after Fibreboard, Continental and the Ness Motley firm had negotiated and Judge Parker had approved the modified Ness Motley settlement on August 9, 1993, which was the only settlement whose negotiations overlapped any of the three-party global negotiations earlier in 1993. App. 316a-319a. Several of class counsel — Messrs. Kazan and Wartnick and the firm of Caplin & Drysdale — were not involved in the Ness Motley settlement and thus could have no conflict of interest arising from its negotiation in any event. App. 312a-319a.

Second, the Ness Motley settlement was not "contingent on approval of a global settlement . . . of all future claims" (Pet. 8). Rather, 50% of the settlement amount was paid in cash and payment of the remaining 50% was conditioned upon the occurrence of any of *three* separate events — a Fibreboard win in the coverage case, a settlement of the insurance disputes between Fibreboard and Continental (as in fact occurred in the back-up Trilateral Agreement), or a global settlement among Fibreboard, Continental and a class of asbestos claimants. Tr. 1128; Fib. Trial Exs. 586, 909a. As the District Court found, every experienced asbestos plaintiffs' lawyer in the country had negotiated settlements under Fibreboard's partial payment and assignment settlement programs whereby payment was contingent on a favorable resolution of Fibreboard's insurance disputes. Thus, particularly given the time pressure created by the impending appellate decision in the coverage case, there was no way the class could obtain competent counsel not subject to the same supposed "conflict". App. 401a-404a. Moreover, the fairness of any global settlement would inevitably be subject to

searching scrutiny by other plaintiffs' counsel and by the courts. Class counsel's presumed desire to facilitate payment of the remaining 50% of their previously settled claims would thus have to include a motivation to negotiate a global settlement that was demonstrably fair to the class for which it was negotiated. App. 405a-407a. Neither petitioners' counsel nor anyone else has ever seriously contended that the amount of the Global Settlement was unfair.

Finally, petitioners' implication that class counsel were induced to sell out the class because some of those counsel — the Ness Motley representatives — had settled their existing cases at "higher than average amounts" (Pet. 8) is flatly contradicted by the record. The District Court explicitly found that (i) the settlement amounts in the modified Ness Motley agreement in 1993 were *lower* than those in the initial Ness Motley agreement in 1992 and (ii) the settlement amounts in the modified Ness Motley agreement were used by class counsel to negotiate a *higher* Global Settlement amount. App. 319a, 407a.

II. CERTIFICATION OF A RULE 23(b)(1)(B) CLASS IN THIS CASE CREATES NO CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS AND WAS PERFECTLY APPROPRIATE

1. Notwithstanding the complete absence of any contrary authority, whether from this Court or other circuits, petitioners seek review of the Fifth Circuit's affirmance of the District Court's class certification of this case under Rule 23(b)(1)(B). Ignoring the class's unitary interest in resolving the risk to all class members presented by the insurance disputes here, petitioners claim that this case involves an attempt to limit the substantive state law tort claims of class

members by converting them into a pro-rata share in an artificially limited settlement fund. Pet. 15-20.

Petitioners err, however, in asserting that the Rule 23(b)(1)(B) class certification here violates the Rules Enabling Act and the Rules of Decision Act by limiting class members' rights to obtain immediate and full payment of their individual state law claims. Pet. 15-17.

Virtually every class action settlement involving claims for money results in a compromise whereby class members receive less individually than they might have obtained if they successfully litigated their claims to judgment. No sensible argument can be made that application of Rule 23 to certify the class in such circumstances violates the Rules Enabling Act, much less the Rules of Decision Act. Any limitation on class members' "substantive" rights to full recovery on their individual claims results from the *settlement* not from the application of Rule 23.

Petitioners are thus flatly wrong in contending that their "substantive" state law rights (i) to recover more than $500,000 on a single claim, (ii) to recover punitive damages, and (iii) to recover pre- or post-judgment interest are being abridged by the lower courts' application of Rule 23(b)(1)(B). Pet. 16-17. It is the provisions of the TDP — which is a component of the Global Settlement agreement — that effects those limitations, not the purely procedural step of certifying a Rule 23(b)(1)(B) class here.

The real issue is whether the class had any claims that could properly be certified under Rule 23(b)(1)(B) and then, upon appropriate notice and hearing pursuant to Rule 23(e), settled in a manner which resulted in class members receiving less than 100 cents on the dollar for their individual claims. If the class claims may properly be certified under Rule 23(b)(1)(B) and the settlement of those claims is fair and

approved in accordance with the required procedures, no issue is presented under the Rules Enabling Act or the Rules of Decision Act, and petitioners have cited no authority from this Court or any other court to the contrary.

As discussed *supra*, at 1-5, the controversies among the parties that justified the certification of a mandatory class under Rule 23(b)(1)(B) to resolve those controversies had to do with the risk to the class that the insurance disputes between Fibreboard and its insurers would result in Fibreboard being left with no assets out of which to pay class members' claims against it. The principal insurance dispute creating this risk was the coverage case.

In addition, other insurance disputes — for example, whether Fibreboard's assignment settlements could be enforced against Continental or instead were breaches of its obligations under Continental's policy, thereby potentially forfeiting Fibreboard's right to coverage — were already being litigated in individual plaintiffs' actions like *Andrus*. *See* Fib. Trial Ex. 304. In any individual suit that Continental did not or could not settle — such as *Andrus* — there was a risk that a decision in Continental's favor would severely compromise other class members' ability to protect their interests — precisely the risk that Rule 23(b)(1)(B) is intended to foreclose.[9]

The class members' unitary interest in eliminating the risk resulting from the insurance disputes to their interests in being compensated for existing or future injuries caused by their exposure to Fibreboard's asbestos products was properly

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[9] Indeed, as noted earlier, after the Global Settlement was reached, an initial trial court decision upholding Fibreboard's assignment settlement program was reversed by the California Court of Appeals in the *Andrus* case. App. 379a-380a.

recognized by both the District Court and the Fifth Circuit majority as a basis for Rule 23(b)(1)(B) certification of the class in this case. App. 57a-58a, 488a-489a.

Petitioners prefer to characterize the class member interests here as "in personam" personal injury claims that are simply being aggregated for settlement purposes and to insist that the settling parties and the lower courts are attempting to justify Rule 23(b)(1)(B) certification by contending that the fund created by the settlement is a "limited fund." By attempting to confine the issue to the existence *vel non* of a limited fund, petitioners seek to have the propriety of the Rule 23(b)(1)(B) certification here turn on straw-man debates about whether this case is an *in rem* action (Pet. 17) and whether every case involving a settlement creates a "limited fund" because the settlement amount is not open-ended (Pet. 19).

These arguments are red herrings. Respondents are not claiming that the Global Settlement *itself* creates a limited fund that justified Rule 23(b)(1)(B) certification. Nor are respondents arguing that it is permissible simply to aggregate personal injury claims against a solvent or well-insured defendant for settlement purposes under Rule 23(b)(1)(B). What respondents contend, and what the District Court and the Fifth Circuit both held, is that it is consistent with the language and purpose of Rule 23(b)(1)(B), as well as legally and constitutionally permissible, to certify a mandatory class consisting of persons exposed to a defendant's asbestos products who have or will develop injury or death as a result of that exposure for the purpose of resolving a real controversy over disputed insurance coverage for that otherwise hopelessly insolvent defendant that will determine

whether any of the members of that unitary class will be compensated at all by that defendant for their claims.[10]

2. Petitioners attempt to minimize the significance of the insurance disputes by asserting that the Trilateral Settlement has "independently" resolved those disputes and that it "guarantees that Fibreboard will have ample insurance to pay future asbestos claims." Pet. 3-4. To the contrary, Fibreboard agreed to the Trilateral Settlement only at the insistence of class counsel as a condition of and a back-up to a Global Settlement with the class; absent the Global Settlement, there would have been no Trilateral Settlement. App. 329a-330a. Moreover, the Trilateral Settlement does not come into effect unless and until the Global Settlement is finally disapproved by the courts. App. 353a-355a. Thus petitioners' assertion that the Trilateral Settlement was negotiated independently of the Global Settlement is flatly wrong. Furthermore, far from "guaranteeing" ample insurance to pay future claims, the Trilateral Settlement would provide hundreds of millions of net dollars less to the class, and would probably leave Fibreboard without sufficient funds to pay

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[10] Judge Smith grudgingly accepted the proposition that the class had a genuine dispute with the insurers but claimed that that dispute did not justify the class's settlement with Fibreboard for what he termed a "mere" $10 million. App. 118a-119a. What Judge Smith and petitioners (Pet. 5) ignore is that (i) no settlement with Fibreboard's insurers was possible without the consent of Fibreboard, the insured, (ii) Continental had already agreed with Fibreboard in the April 9 Agreement that any Global Settlement would be paid entirely out of insurance, and (iii) Fibreboard would not give its consent unless the class accepted the insurers' payment as part of a complete settlement of the class claims against Fibreboard. App. 374a-376a. As for the $10 million of funds from Fibreboard, the issue for the class was whether the total settlement amount of $1.535 billion was reasonable. As is the case with most settlements with insured defendants, it was a matter of indifference to the class whether that amount came from Fibreboard, its insurers or some combination of them.

those class members whose injuries manifest themselves many years in the future. App. 358a-359a, 361a-367a, 501a-502a.[11]

Petitioners' vociferous attack on the use of a Rule 23(b)(1)(B) mandatory class to resolve the instant insurance disputes is puzzling in light of their acquiescence in substantially the same procedure in the companion *Rudd* case which approved the Trilateral Settlement. As required by the parties' agreement, a class action suit was commenced in *Rudd* in which virtually the same persons who comprise the plaintiff class here were included as a defendant class in an action seeking a declaration that the Trilateral Settlement was fair and reasonable to, and binding upon, the class.[12] *Rudd* was ultimately resolved when the class consented to the relief sought. Although the *Rudd* suit and the instant case raised many of the same issues concerning the propriety of Rule 23(b)(1)(B) certification of a non-opt-out class consisting of exposure-only and currently injured asbestos claimants, those aspects of the *Rudd* case were not challenged by the Ortiz petitioners nor objected to by Judge Smith when such objections were pressed by the Flanagan petitioners, and *Rudd* is now final. *See* Pet. 4 n.4, App. 93a-97a, 109a.

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[11] Petitioners suggest (Pet. 2 n.1) that Fibreboard's 1997 acquisition by another asbestos defendant, Owens-Corning, could "expand enormously" the assets available to pay claims against Fibreboard. This development occurred four years after this case was settled; it is obviously irrelevant in deciding whether the lower courts' decisions based on the factual record as it existed when the settlement was approved were correct. In any event, petitioners nowhere explain how Owens-Corning's purchase of Fibreboard's stock could make Owens-Corning's assets available to satisfy claims against Fibreboard, which remains a wholly separate corporation.

[12] Also included were persons who had filed but not settled or gone to judgment in cases against Fibreboard as of August 23, 1993. *See* page 5, note 4, *supra*.

The enthusiasm of petitioners' counsel for the Trilateral Settlement, notwithstanding its strikingly inferior benefits for the class, is at least partially explicable by their desire for higher attorneys' fees. One of the reasons why the Global Settlement produces far greater net dollars for the class is that it limits the fees chargeable by plaintiffs' counsel for prosecuting claims against the settlement trust to a maximum of 25% of any recoveries. By contrast, fees equal to 33%-40% of the recovery are normally charged by plaintiffs' counsel, including counsel for petitioners, in the tort system. App. 365a.[13]

3. Petitioners contend that, because the motivating force behind the settlement from the perspective of the class was the insolvency of Fibreboard should it lose the insurance disputes, effectuating the settlement outside of bankruptcy is an improper attempt to circumvent the Bankruptcy Code. Pet. 19-21. However, petitioners' "circumvention" argument must be premised on the proposition that application of the Bankruptcy Code was an available and realistic option for the class here — a premise that is demonstrably wrong.

The District Court found that Fibreboard would not file for bankruptcy as long as it had any hope of prevailing on the coverage disputes with the insurers. App. 375a-376a. The members of the *Ahearn* class by definition had not yet filed suit against Fibreboard and thus had no unpaid judgments against it; they could not have sought to put Fibreboard into bankruptcy involuntarily even had they desired to do so. App. 375a. *See* 11 U.S.C. § 303(b)(1); *In re Raymark Industries, Inc.*, Case No. 89-20233T (Bankr. E.D.Pa., Aug. 9, 1996) (as long as asbestos manufacturer continues to

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[13] Indeed, counsel for the Flanagan petitioners made his concern over the reduction in his prospective fees quite explicit at the settlement fairness hearing. *See* Tr. 1296-1301.

dispute its liability and pay judgments as due, asbestos claimants cannot put it into involuntary bankruptcy).

Those persons outside the *Ahearn* class who did have unpaid settlements with Fibreboard had uniformly determined not to seek to put Fibreboard involuntarily into bankruptcy pending the outcome of its insurance disputes because a favorable outcome of those disputes was the only way in which they could hope to be paid over $1.2 billion in settlements then outstanding. App. 277a-279a, 285a-286a, 302a-303a. Having Fibreboard in bankruptcy would not facilitate or improve its chances of prevailing in the coverage case or any of its other insurance disputes; bankruptcy proceedings would merely reduce Fibreboard's value by interfering with its business operations.

Since Fibreboard could lose the insurance disputes whether in or out of bankruptcy, and since the class had no ability or motive to force Fibreboard into bankruptcy until and unless it *lost* the coverage disputes, the only way for the class to protect itself against the risk of that loss was to participate in a negotiated settlement of the insurance disputes with the insurers and Fibreboard. Once that settlement was secured, Fibreboard was no longer faced with insolvency and the class could equitably share in the settlement fund pursuant to Rule 23(b)(1)(B) and Rule 23(e). Such a resolution is plainly consistent with the Bankruptcy Code, which permits the dismissal or suspension of pending bankruptcy cases where an arrangement is worked out among the debtor and its creditors outside of bankruptcy court. *See* 11 U.S.C. § 305(a).

III. THE CLASS ACTION CLAIMS SETTLED HERE AROSE FROM A JUSTICIABLE CONTROVERSY

As an adjunct to their efforts to ignore and avoid the insurance disputes that formed the motivation for and basis of

the settlement challenged here, petitioners claim that this class action does not present a justiciable controversy under Article III of the Constitution because "the negotiations [of the settlement] did not involve the resolution of *existing* legal claims for *actual* injuries, but the establishment of an elaborate alternative dispute resolution scheme to take control of any and all *future* asbestos claims against Fibreboard." Pet. 26.[14]

Petitioners base their contention that the settlement here affects primarily class members who "have no injuries and no ripe legal claims" (Pet. 25) on their insistence that (i) the only claims of injury asserted in the complaint on behalf of the "exposure-only" majority of class members were for fear of cancer, enhanced risk of developing cancer and medical monitoring, (ii) those claims neither could nor were intended to be actually litigated, and (iii) the settlement provided no specific redress for those claims. Pet. 27.

Petitioners appear to read this Court's decision in *Amchem* to have adopted the Third Circuit's holding below, *Georgine v. Amchem Products, Inc.*, 83 F.2d 610, 625 (3d Cir. 1996), that a class action cannot be certified under Rule 23 if it asserts claims that cannot be litigated to judgment in the absence of a settlement and, based on that reading, argue that the class settlement here was improperly approved because the complaint that commenced this action similarly

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[14] Petitioners are clearly wrong in characterizing this settlement as creating a compelled alternative dispute resolution system that deprives them of their day in court. The settlement offer negotiation process established by the TDP, including non-binding mediation and arbitration, is ultimately consensual because if, in the prosecution of an individual claim, a class member is dissatisfied with the results of that process, he or she has an absolute right to sue the trust in the tort system. App. 585a-598a.

asserted no claim that could have been litigated in the absence of a settlement.

This approach stands the issues discussed in *Amchem* on their heads. At most, the question is not whether the parties have settled the issues they pleaded but, rather, whether they could have litigated the issues they settled.[15]

Notwithstanding petitioners' tortured lo[illegible] this case plainly involves a justiciable controversy. As described above, the representative plaintiffs and all class members here had a strong and unitary interest in the outcome of an existing coverage dispute. That interest was pleaded in the complaint (App. 556a-559a) and class members had standing to litigate that interest under California law,[16] as well as under the Declaratory Judgment Act, 28 U.S.C. § 2201.[17] Indeed, they could properly have litigated that interest in a Rule 23(b)(1)(B) class action since the piecemeal prosecution of

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[15] Even this proposition may overstate the question in light of the decision in *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996), where this Court upheld a class action settlement that resolved claims that were not pleaded and, for jurisdictional reasons, could not have been litigated in the action that was settled.

[16] California law, which would govern under Texas conflicts of law rules, *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984), permits third-party plaintiffs to obtain declaratory relief against a defendant's insurer before judgment on a coverage question to determine the existence and scope of coverage. *See Omaha Indem. Co. v. Superior Court*, 258 Cal. Rptr. 66 (Cal. App. 1989); *General Ins. Co. of America v. Whitmore*, 45 Cal. Rptr. 556 (Cal. App. 1965). *See also Horace Mann Ins. Co. v. Barbara B.*, 846 P.2d 792, 795 (Cal. 1993). *Compare Shapiro v. Republic Indem. Co.*, 52 Cal. 2d 341, 437 P.2d 289 (1959).

[17] *See Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941); *Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1332-33 (11th Cir. 1989); *Farmers Alliance Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1386 (10th Cir. 1978).

separate actions by individual class members over the coverage issues would as a practical matter be dispositive of the interests of the remaining class members — the very predicate of a Rule 23(b)(1)(B) case. Moreover, as a suit seeking declaratory relief, such an action could also have proceeded as a mandatory, non-opt-out class action under Rule 23(b)(2).[18] Such a declaratory judgment action could have been settled among the plaintiffs, Fibreboard and Continental just as happened here.

Thus, if the Court were to grant review on the "justiciability" issue framed by petitioners, the only question would be whether or not to deem the pleadings amended to conform to the matters raised and the evidence adduced at the fairness hearings, pursuant to 28 U.S.C. § 1653 and Rule 15(b) of the Federal Rules of Civil Procedure.[19] That question hardly merits review. *Compare Chandler v. Miller*, 117 S. Ct. 1295, 1300 n.2 (1997). Petitioners' other arguments that this case does not satisfy Article III requirements, together with their arguments that due process

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[18] That rule provides for mandatory class actions where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

[19] Appellate courts permit pleading amendments on appeal where necessary to affirm a trial court judgment. *See* 28 U.S.C. § 1653; 6A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure: Civil 2d § 1494 (1990). Indeed, both this Court and courts of appeal have deemed pleadings "constructively amended" to conform them to the proof and decision below without requiring a formal motion to amend from the plaintiff. *See, e.g.*, *Chandler v. Miller*, 117 S. Ct. 1295, 1300 n.2 (1997); *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 388-89 (5th Cir. 1984); *City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 201-02 (5th Cir. 1965).

requires opt-out rights here and that adequate notice could not be given to the class, are fully addressed in the opposition briefs being filed concurrently by respondents Continental and Pacific and respondent Fibreboard.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

IN RE ASBESTOS LITIGATION:

JAMES FLANAGAN AND DAVID H. MIDDLETON,

Petitioners,

v.

GERALD AHEARN; JAMES MCADAMS DENNIS; CHARLES W. JEEP; JAMES DRAKE; JUANITA DRAKE; JAMES ELLISON; ROLAND DEARBORN; JUDITH DEARBORN; KERWIN BUTCHER; DIR., WORKERS' COMP., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; PAUL COCHRAN; IDA BECK; MARION BEHEE; LONGSHORE, INTERVENOR; WILLIAM JAMES MITCHELL; FIBREBOARD CORPORATION; BETHLEHEM STEEL CORPORATION; CONTINENTAL CASUALTY COMPANY; PACIFIC INDEMNITY; FRANCIS McGOVERN; OWENS-ILLINOIS, INC.; PENN MUTUAL LIFE INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; CNA CASUALTY COMPANY OF CALIFORNIA; CELOTEX CORPORATION; DANIEL HERMAN RUDD, JR., ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED; JOHN HANSEL, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONERS FLANAGAN AND MIDDLETON

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REPLY BRIEF OF PETITIONERS FLANAGAN AND MIDDLETON

NOW COME James Flanagan and David H. Middleton, Petitioners in Docket No. 97-1695, and present their Reply to the Briefs filed by various Respondents in opposition to their petition, as well as the petition filed by Esteban Ortiz, et al., in Docket No. 97-1704.

PREFACE

The Proponents of the Global Settlement urge most strenuously that *Ahearn* is one-of-a-kind, and that this Court ought to handle the matter in a pragmatic way and, by denying the instant petition for certiorari, allow the settlement to stand, even if it is violative of the principles laid down in *Amchem*. Effectively, the Proponents suggest that in the guise of expediency this Court ought to suspend the operation of its own precedent. The suggestion is tantamount to urging the Court to engage in an unscrupulous undertaking. This Court never suspends operation of one of its own precedents. With that, the underscoring point is made; the underpinning reasoning of the *Ahearn* Proponents is not only flawed, but is utter folly.

IT IS NOT THE PLACE OF A LOWER FEDERAL COURT TO "BEND" THE PRINCIPLES ENUNCIATED BY THIS HIGHEST COURT.

In his dissent in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904), Justice Holmes wrote:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

To the extent the principles of class action law were not clear prior to *Amchem Products, Inc. v. Windsor*, 521 U.S. ___, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997), those principles are now "well settled". It appears that the Fifth Circuit panel majority which approved the *Ahearn* Global Settlement in *In re Asbestos Litigation [Ahearn I]*, 90 F.3d 963 (5th Cir. 1996) and *In re Asbestos Litigation [Ahearn II]*, 134 F.3d 668 (5th Cir. 1998) was suffering from those very "appeals to the feelings" – a sense that the Global Settlement is a deal which ought to be pushed through at all costs. This Court warned in *Amchem* that "the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind – class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness." *Amchem*, 117 S. Ct. at 2248.

Indeed, Petitioners can only conclude that some consideration – whatever it may have been – competing with the lower court's duty of fidelity to the holdings of this Court "distort[ed] the judgment" of the Fifth Circuit panel majority.

The striking similarities between *Amchem* and *Ahearn* were, no doubt, central to this Court's issuance of a "GVR" order mandating further consideration on remand. Still, the Proponents of the Global Settlement distinguished their position by posturing a distinction without a difference. Witness the first sentence of their brief where the class representatives reason lamely:

> This is the *Ahearn* case not the *Amchem* case . . .

Continental likewise urges that the *Ahearn* Global Settlement is not a "carbon copy" of the *Amchem* Settlement. See also Continental's Brief, p. 5 (claiming that Petitioners "pretend that this case is *Amchem* itself").

The "carbon copy" argument is absurd. History teaches that no two events are exactly the same. Jurisprudence similarly recognizes that no two cases are precisely the same. The question an orderly system of jurisprudence asks is:

> *Is there sufficient similarity – in material aspects – between the case at bar and the prior case enunciating a general principle, that the principle of the prior case must be followed?*

As the highest tribunal in the land, this Court sits to announce *principles* of general application, not to make ad hoc proclamations with exclusive applicability to the precise facts before it.[1] (Were the latter so, the Court might just as well close its doors.)

---

[1] As Petitioners pointed out in their Petition, common-law courts do not issue their decisions with the caveat that "This rule holds only to redheaded Walpoles in pale magenta Buick cars." *Bhandari v. First National Bank of Commerce*, 829 F.2d 1343, 1352 (5th Cir. 1987) (Higginbotham, J., concurring opinion,

IF LEFT UNCORRECTED, THE FIFTH CIRCUIT'S DECISION SETS THE STAGE FOR MORE *AHEARN* CLONES.

Two of these things go together,
Two of these things are kind of the same.

– Preschooler's song from *Sesame Street*

"Unique facts, unique facts": This is the siren song the Proponents of the *Ahearn* Global Settlement sing to this Court[2], urging that those facts will never be repeated, and hence, the Fifth Circuit's *Ahearn I* and *II* decisions are fated to gather dust as forgotten pages of the Federal Reporter.

In the first sentence of their Brief, the Insurers Continental, et al. , urge that *Ahearn* is "a *sui generis* case". "*Sui generis*" is defined variously as "Of its own kind; peculiar, unique." (The New Shorter Oxford English Dictionary 3135 [1993]); "Of its own kind or class; i.e., the *only one* of its own kind; peculiar." (Black's Law Dictionary 1286 [5th ed. 1979], emphasis in the original).

Laying to one side the question of whether a case which commenced not with the filing of a complaint[3], but with a barbeque at a judge's home is "peculiar", we consider whether *Ahearn* is a jurisprudential Paris Original, never-to-be-repeated, "the *only one* of its kind". The

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quotation attributed to Karl N. Llewellyn, *The Bramble Bush* [1960]).

[2] Counsel for the *Ahearn* Class are singing for a handsome supper, indeed: An award of attorney's fees in excess of $46 million is riding on this Court's decision whether to strike down or uphold the *Ahearn* Global Settlement.

[3] See Fed. R. Civ. P. 3.

Proponents of *Ahearn* have forgotten that, by virtue of being subject to American law, they are citizens of a jurisprudential universe governed by precedent. Now that *Amchem's* cogent teachings have become part of the *corpus juris*, lawyers and judges bound thereby will analogize to, or distinguish from, the facts of *Amchem*. This is not an inquiry we embarked upon for the first time in law school; indeed, at our mother's knee we start learning that "Two of these things are kind of the same".

Petitioners submit that, outside the ivory-tower world of legal sophistry, any honest, sensible, reflecting individual could not but conclude that not only are *Amchem* and *Ahearn* "kind of" the same; they are very much the same. This Court did not send the cause back for further consideration so that the lower tribunal could congratulate itself on the perfection of its initial reasoning. The Court issues a GVR order "[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration. . . . " *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

The Proponents of *Ahearn* are fooling no one. Defendants in mass-tort cases are even now crossing their fingers in the hope that this Court will deny certiorari and thus carve out the Fifth Circuit as a safe harbor in which they can force "unitary" settlements upon injured persons. As the Dissent wrote in *Ahearn I*:

> This case is extraordinarily important. Prior to the filing of this suit, no one had ever attempted a no-opt-out, mass-tort, settlement-only, futures-only class action. Ever since the district court's certification order, however, corporate America

> has been "anxiously awaiting" a decision in this case. Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST.J., July 18, 1996, at A1. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map for sheltering their assets and improperly restricting the rights of their present and future victims." [citation omitted]
>
> Thus, the majority's reliance upon the "unique facts" of this case, *see* maj. op. at 993, is ironic: The unique fact of the insurance dispute is simply irrelevant, and the other unique facts – a corporate defendant's hand-picking class counsel, cutting a side deal, reaching a "global settlement" affecting only "future" plaintiffs, and choosing a sympathetic judge to approve the settlement – likely will become far too common now that the majority has approved of them.

Ahearn I Dissent, 90 F.3d at 994 (Smith, J.).

THE *LIGGETT* DECISION BELIES THE ASSERTION THAT *AHEARN*'S "UNIQUE FACTS" WILL NEVER BE REPEATED.

Incredibly, Continental asserts a "lack of any conflict among the lower courts as to [*Amchem's*] meaning" (Continental's Brief, p. 2). If left uncorrected by this Court, other toxic-tort defendants are as certain to follow the aberrational precedent of the *Ahearn I* and *II* decisions as "a flock of sea gulls follows a lobster boat." *United States v. Barnes*, 604 F.2d 121, 175 (2d Cir. 1979) (Oakes, J., dissenting).

This is abundantly shown by the decision *Walker v. Liggett Group, Inc.*, 175 F.R.D. 226 (S.D.W.Va. 1997). The court in that case, "one of the first of many that will interpret *Amchem*," had no difficulty in holding, in essence, that *Amchem* means what it says.

The proposed settlement in *Liggett* was drawn in the same "total peace" pattern as *Ahearn*.[4] In *Walker*, class plaintiffs and the defendant (a cigarette manufacturer) sought to certify a non-opt-out class under Rule 23(b)(1)(B) for settlement only. The settling parties claimed that "Liggett is in dire financial condition and facing a crush of pending litigation." 175 F.R.D. at 228. Liggett "entered into a comprehensive settlement agreement with Plaintiff and the putative class." *Id.* Like *Amchem* and *Ahearn*, the class was "nothing short of enormous." 175 F.R.D. at 229. Liggett sought an injunction to prevent further smoking-related litigation against it. *Id.* Prior to the issuance of this Court's *Amchem v. Windsor* decision, the District Court granted preliminary certification and preliminary approval of the settlement.

Upon issuance of this Court's *Amchem* decision, the District Court did a prompt about-face, setting aside the class certification. The court observed that *Amchem* "rests on two independent pillars: the predominance requirement of Rule 23(b)(3) and the adequacy-of-representation

---

[4] *Walker v. Liggett Group* illustrates a central problem with the Fifth Circuit's *Ahearn I* and *II* decisions, which upheld the Global Settlement based on the alleged "unique facts" of the case. In a judicial system governed by precedent, the supposed "unique facts" become a blueprint for the creative lawyer. The "unique facts" are largely in the eye of the beholder.

standard of Rule 23(a)(4)." *Liggett*, 175 F.R.D. at 230, n.6 (citing John C. Coffee Jr., *After the High Court Decision in Amchem Products Inc. v. Windsor, Can a Class Action Ever Be Certified Only for the Purpose of Settlement?*, National L.J., July 21, 1997). The requirement of adequate representation is "an absolute prerequisite". *Id. Accord, Liggett*, 175 F.R.D. at 231 (adequate representation a "bedrock" consideration in considering propriety of class certification); 175 F.R.D. at 233 ("Rule 23(a)(4) must be satisfied for any proposed limited fund class, regardless of perceived notions of equity.")

In *Liggett* it was argued that because of the limited availability of funds to pay claims, the currently injured were in the same position as future victims. The Court rejected that argument:

> In reality . . . the alleged limited fund exacerbates the apparent conflicts creating what has been described as a zero-sum game.

Liggett, 175 F.R.D. at 231, n.8.

Despite its earlier approval of the non-opt-out, limited-fund settlement, the Court was unable to see any honest, good-faith way to distinguish *Amchem* from the case before it, and accordingly granted the Intervenor-Objector's motion to set aside the class certification: "While the parties differ in their reading of the Supreme Court's intentions, the bedrock similarity between *Amchem* and the instant case is manifest . . . " *Liggett*, 175 F.R.D. at 233.

The parties in *Liggett* filed suit without benefit of this Court's June, 1997 *Amchem* decision. Should this Court deny certiorari in this case, future *"Ahearns"* or *"Liggetts"*

will be filed in the hospitable Fifth Circuit – the only jurisdiction in which *Amchem* does not mean what it says.

CONCLUSION

These Petitioners submit that "the bedrock similarity between *Amchem* and the instant case is manifest . . . " *Liggett*, 175 F.R.D. at 233. The principles laid down in *Amchem Products, Inc. v. Windsor* require that the Fifth Circuit's approval of the *Ahearn* Global Settlement be set aside.[5]

DATED at Detroit, Michigan this 26th day of May, 1998.

Respectfully submitted,

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[5] The deeper we delve into the issues of this cause, the more it is recognized that the position enunciated in the dissenting opinions by Judge Jerry Smith in *Ahearn I* and *II* is not only cogent, but indeed compelling.

(M) (1)

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October Term, 1997

ESTEBAN ORTIZ, *et al.*,

Petitioners,

vs.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

The National Association of Commercial Law Attorneys (NASCAT) is an association of law firms and attorneys who litigate cases involving antitrust, commercial, consumer, employee and retiree benefit, environmental, and securities fraud claims in federal and state courts. NASCAT's members frequently represent victims of corporate abuse, schemes to defraud, defective products, and anti-competitive conduct. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior, and improve victims' access to justice.

In literally thousands of cases filed over the past 30 years, NASCAT's members have represented plaintiffs in class actions brought under Federal Rule of Civil Procedure 23, or its state law equivalents, including innumerable cases settled or tried to verdict. In each of those cases, NASCAT's members and their clients (the proposed class representatives) have sought to satisfy the adequate representation requirement of Rule 23(a)(4). Several of those cases have involved classes certified

---

[1] Letters of consent to the filing of this *amicus* brief received from Petitioners' and Respondents' counsel have been filed with this Court. Pursuant to Supreme Court Rule 37.6, NASCAT certifies that no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

under subdivision (b)(1)(B) of Rule 23, including *In re Drexel Burnham Lambert Group*, 960 F.2d 285 (2d Cir. 1992), in which the Second Circuit affirmed Judge Pollack's certification of claims brought by securities claimants against Drexel, a bankrupt securities brokerage firm, and affirmed the trial court's approval of a $350 million settlement. *Drexel* and other decisions issued by the lower federal courts since Rule 23 was amended in 1966 demonstrate that subdivision (b)(1)(B) must be applied flexibly, not restrictively, in accordance with the particular facts and circumstances of each individual case and that, if the trial court properly considers the evidence proffered by the parties and makes requisite findings of fact and conclusions of law in certifying the class under this provision, its judgment should be affirmed on appeal.

As a result of its members' collective experience, NASCAT believes and advocates in this *amicus curiae* brief that the district court properly certified the class under Rule 23(a)(1)-(4) and (b)(1)(B) and properly approved the Global Settlement Agreement in this case.[2]

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[2] The district court's Memorandum Opinion certifying the class and approving the settlement is reported as *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995), and is reproduced as Appendix E to the Petition for Writ of Certiorari (Volume I) (the "Petition"), CA 183a-242a. The district court's Findings of Fact are reported as *Ahearn v. Fibreboard Corp.*, Civil Action No. 6:93cv526, 1995 U.S. Dist. LEXIS 11532 (E.D. Tex. July 27, 1995), and are reproduced as Appendix F to the Petition (Volume II), CA 243a-468a. The district court's Conclusions of Law are reported as *Ahearn v. Fibreboard Corp.*, 1995 U.S. Dist. LEXIS 11523 (E.D. Tex. July 27, 1995), and are reproduced as Appendix G to the Petition (Volume III), CA 469a-511a. The district court's Supplemental Conclusions of Law are reported as *Ahearn v. Fibreboard Corp.*, 1995 U.S. Dist. LEXIS 11531 (E.D.

NASCAT also believes and advocates below that the Fifth Circuit properly affirmed the district court's entry of judgment. For the reasons that will be advanced, NASCAT files this *amicus curiae* brief in support of Respondents and respectfully submits that the decision of the court below should be affirmed.

INTRODUCTION AND SUMMARY OF ARGUMENT[3]

The district court and the Fifth Circuit correctly found that the proposed class representatives satisfied the prerequisites of Rule 23(a)(1)-(4), including the "adequacy of representation" requirement. The courts below correctly rejected arguments concerning purported "intraclass conflicts" posited by Petitioners and their *amici*, which amounted to potential, hypothetical, or theoretical conflicts that the federal courts have uniformly found not to defeat class certification.

The district court properly certified the class under Rule 23(b)(1)(B), finding that plaintiffs and class members shared a common "significant risk" of losing Fibreboard's insurance coverage if piecemeal litigation was allowed to proceed, and the Fifth Circuit properly affirmed that finding. As an *alternative* holding – one that this Court need

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Tex. July 27, 1995), and are reproduced as Appendix H to the Petition (Volume III), CA 512a-518a.

[3] Page references to the briefs filed by Petitioners and their *amici* are stated as "Pet. Brief. at ___" (Brief for Petitioners), "Law Professors Brief at ___" (Brief of Legal Ethics, Civil Procedure, and Constitutional Law Scholars as *Amici Curiae* in Support of Petitioners), and "Trial Lawyers Brief at ___" (Brief of *Amicus Curiae* Trial Lawyers For Public Justice, P.C., In Support Of Petitioners).

not reach – the district court properly certified the class under subdivision (b)(1)(B) by finding that a "limited fund" existed; the Fifth Circuit correctly affirmed that alternative holding.

ARGUMENT

I. THE COURTS BELOW PROPERLY FOUND THAT THE PROPOSED CLASS MET THE PREREQUISITES OF RULE 23(a) AND THAT THE INTERESTS OF THE CLASS REPRESENTATIVES AND THE MEMBERS OF THE CLASS ARE NOT ANTAGONISTIC

A. The Rulings Of The Courts Below

A class may be certified if all four prerequisites of Rule 23(a) are met and one or more of the provisions of Rule 23(b) is satisfied. *See Amchem Products, Inc. v. Windsor*, ___ U.S. ___, 117 S. Ct. 2231, 2245 (1997); 5 James W. Moore, *Moore's Federal Practice* ¶23.20, at 23-55 (2d ed. 1998) ("5 J. Moore"); 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 1759, at 97 (1986) ("7A Wright, Miller & Kane"). In this case, the district court found that the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – were met. *See* CA 223a-230a (162 F.R.D. at 523-26); CA 478a-484a (Conclusions of Law, ¶¶12-24); CA 513a-514a (Supplemental Conclusions of Law, ¶¶2-5). In the original appeal, the intervenors did not dispute the district court's finding of numerosity, but they argued that the class met none of the other Rule 23(a) prerequisites; the Fifth Circuit, however, rejected these contentions. CA 54a-72a (90 F.3d at 974-82); *see also* CA 2a-3a (134 F.3d at 670) ("We detailed

in our prior opinion our agreement with the thorough study and conclusions by the district court, satisfying the requirements of class certification under Rule 23(a).").

Petitioners and their *amici* now focus their attack upon Rule 23(a)(4)'s "adequacy-of-representation" requirement, seeking to persuade this Court that even a potential, hypothetical, or theoretical "conflict" between class members *per se* renders the class representatives inadequate. *See* Pet. Brief at 18-22; Law Professors' Brief at 9-12. Their arguments were raised in the courts below, were thoroughly analyzed by the district court and the Fifth Circuit, and were properly rejected.

B. Potential, Theoretical, Or Hypothetical Intra-class "Conflicts" Do Not Prevent Class Certification Under Rule 23(a)(4)

A class action may be certified by the district court only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement ensures that the class be "adequately represented both by counsel and by the named representative plaintiffs." *Linney v. Cellular Alaska Partnership*, No 97-16637, 1998 U.S. App. LEXIS 20484, at *7 (9th Cir. Aug. 21, 1998) (citations omitted). "Adequate representation" depends on the qualifications of counsel for the class representatives, " 'an absence of antagonism, a sharing of interests between representatives and absentees [class members], and the unlikelihood that the suit is collusive.' " *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992) (citation omitted); *see also General Tel. Co. v. Falcon*, 457 U.S. 147, 159-60 n.13 (1982) ("adequacy-of-representation" requirement focuses on "conflicts of interest"). *See generally* 7A Wright, Miller & Kane,

§ 1768, at 326-66 (elucidating what constitute "antagonistic" or "conflicting" interests between class representatives and class members); 5 J. Moore, ¶23.25[4][b][i], at 23-118 (same).

In this case, after conducting an eight-day evidentiary hearing and properly taking the proposed settlement into account, *see Amchem*, 117 S. Ct. at 2248-49, the district court found that "[t]he Class representatives have . . . adequately represented the Class," CA 228a (162 F.R.D. at 525), rejecting the intervenors' arguments that there was a "conflict" between them and class members because they were united by a common interest in resolving Fibreboard's insurance coverage dispute:

> The Court concludes that the Class representatives have a sufficient stake in the outcome and that the interests of the Class representatives and the members of the class are not antagonistic. The Class representatives span the range of the various medical categories under the Trust Distribution Process and include both already-impaired and not-yet-impaired claimants. The class representatives and the members of the class – all of whom are equally at risk in the coverage litigation – are united in seeking the maximum possible recovery for their asbestos-related claims.
>
> The class representatives adequately represent those Class members whose injuries have not yet become manifest. The Complaint is expressly brought on behalf of unimpaired Class members; and unimpaired Class members have interests in the global settlement common with each of the Class representatives and are united with them in eliminating the risk of the coverage litigation by seeking the maximum possible settlement for the entire Class.

CA 482a-483a (Conclusions of Law, ¶¶22-23); *see also* CA 382a-386a (Findings of Fact, ¶¶279-88) (determining adequacy of Global Health Claimant Class Representatives). The district court found – and the Fifth Circuit agreed – that the class representatives and class members had an overriding common interest in achieving an immediate, class-wide resolution to the insurance coverage dispute. CA 361a-362a (Findings of Fact, ¶232); CA 98a (90 F.3d at 993). *See* 7A Wright, Miller & Kane, § 1768, at 359 ("potential conflict" between class representatives and members "should not preclude the use of the class action device if the parties appear united in interest against an outsider").

The extensive factual record in this case, including the testimony of 18 witnesses and the hundreds of documents introduced and considered by Jude Parker at the eight-day fairness hearing, reinforces the conclusion that the district court exercised its sound discretion in finding that the class representatives adequately represented the interests of already-impaired and not-yet-impaired claimants. The district court carefully considered, and properly rejected, the intervenors' contention that purported "intraclass conflicts" between class members – no matter how artificial or arbitrary – require the creation of subclasses.

Taken to their logical extreme, the arguments advanced by Petitioners and their *amici* would mean that any time an objector's lawyer could point to any type of potential, hypothetical, or theoretical "conflict" between class members, subclasses would have to be created and separate negotiating counsel appointed for each supposedly conflicting group (or sub-group). From

NASCAT's collective experience, which involves representing plaintiffs in thousands of class actions, the result likely would be chaos and many putative class actions never would be certified, let alone settled. Gratefully, the federal courts by and large have rejected the notion advanced by Petitioners and have properly exercised their sound discretion and refused to allow purely "potential" conflicts to derail class certification.[4]

Petitioners and their *amici* ignore the fact that the district court expressly considered the alleged "intraclass conflicts" they previously raised,[5] with Judge Parker

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[4] Thus, in a recent opinion, the Third Circuit affirmed the district court's finding that plaintiffs satisfied Rule 23(a)(4)'s adequacy of representation requirement:

> We believe the district court exercised its sound discretion when it found . . . the named plaintiffs adequately represent the class. . . .
>
> [T]he crux of this class action is the allegation that Prudential engaged in a scheme to defraud policyholders by means of company-wide deceptive sales practices. The named parties, like the members of the class, would need to establish this scheme in order to succeed on any of the claims in the Second Amended Consolidated Complaint. Even those class members with "other" claims share the common task of demonstrating the existence and implementation of this scheme. Consequently, we believe the proposed class satisfies the adequacy of representation requirement of Rule 23(a).

In re Prudential Ins. Co. of America Sales Practices Litig. Agent Actions, 148 F.3d 915, 1998 U.S. App. LEXIS 17057, at *87-88 (3d Cir. July 23, 1998).

[5] According to the district court, the Ortiz Intervenors contended that "intraclass conflicts" exist between each of the following pairings of groups of Global Health Claimant Class members: (1) class members who were first exposed to asbestos-

stating that the intervenors' expert witness "acknowledged at the fairness hearing that separate subclasses consisting of these various groups are not required, but he asserted that separate counsel should have been appointed to negotiate on behalf of the various interests of" class members. CA 414a (Findings of Fact, ¶343). As Judge Parker further stated:

> [T]he Court finds that Professor Leubsdorf's testimony on these points lacks credibility. *Professor Leubsdorf expressed the view that distinctions, often arbitrarily chosen, create conflicts that prevent ethical representation of a class even where the common interests shared by the class members vastly outweigh the distinctions among them, and the settlement fairly accommodates all interests.* The Court takes judicial notice that, were this view to be correct, numerous settlements reflecting far more blatant distinctions among intraclass groups would necessarily have been the product of unethical conduct.

CA 414a (Findings of Fact, ¶344) (emphasis added). The Fifth Circuit agreed, noting that "[t]he record amply supports [the district court's] findings." CA 62a (90 F.3d at 978).

The experience of NASCAT members in securities fraud cases demonstrates that creative lawyers whose intent is to oppose class certification or derail a potential settlement always can dream up supposed "conflicts"; however, the courts usually (and properly) find that these

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containing products prior to March 15, 1959, and those who were first exposed after that date; (2) class members who have already suffered a "cognizable" asbestos-related injury and those who have not yet suffered such an injury; and (3) class members who will be individually represented in filing their claims against the Trust by plaintiffs' counsel and those who will not. CA 413a-414a (Findings of Fact, ¶343).

supposed intraclass "conflicts" are far outweighed by the *common* interests of class members. *See Blackie v. Barrack*, 524 F.2d 891, 908-10 (9th Cir. 1975) (securities fraud class action; rejecting notion that conflict existed between those class members who sold corporation's stock during class period and those who retained it).[6] If Petitioners were correct and the sort of hypothetical "conflicts" between class members that they posit preclude an adequacy-of-representation finding under Rule 23(a)(4), then defrauded shareholders never could represent bondholders in securities class actions, *cf. In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, 140 F.R.D. 425 (D. Ariz. 1992) (denying motion to decertify class of more than 20,000 shareholders and bondholders); current employees never could represent former employees in benefit actions, *cf. Walsh v. Northrop-Grumman Corp.*, 162 F.R.D. 440, 447-48 (E.D.N.Y. 1995) (ERISA action; potential antagonism between current and former employees was too speculative to cause inadequate representation); and current employees who were the victims of racial or sexual discrimination never could represent each other, *cf. Orlowski v. Dominick's Finer Foods*, 172 F.R.D. 370, 374 (N.D. Ill. 1997) (any finding that named plaintiffs' interests conflict with those of class members "because all competed for a scarce number of promotion

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[6] *See also Kalodner v. Michaels Stores, Inc.*, 172 F.R.D. 200, 208 (N.D. Tex. 1997) (no conflict of interest between earlier and later purchasers of stock); *In re Cirrus Logic Sec. Litig.*, 155 F.R.D. 654, 663 (N.D. Cal. 1994) (same; current shareholder could adequately represent former shareholders); *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 408 (D.N.J. 1990) (plaintiff who purchased stock based upon broker's advice could adequately represent those who did not).

opportunities" would " 'doom[ ]' " every class action charging discrimination in promotion) (citation omitted).

This Court should reject the notion advanced by Petitioners and their *amici* that any sort of "intraclass conflict," no matter how potential, hypothetical, or theoretical, should be permitted to prevent class certification – or approval of a settlement – under Rule 23(a)(4)'s "adequacy-of-representation" requirement. Rather, as the courts and commentators have recognized, if the class members are united in interest against an outsider, that union outweighs any potential conflicts.

II. THE COURTS BELOW PROPERLY CERTIFIED A CLASS UNDER RULE 23(b)(1)(B)

A. The Rulings Of The Courts Below

Rule 23 provides that a class action may be maintained if the prerequisites of subdivision (a) are satisfied and, in addition, "the prosecution of separate actions by or against individual members of the class would create a *risk* of . . . adjudications with respect to individual members of the class which would *as a practical matter* be dispositive of the interests of the other members not parties to the adjudications or *substantially impair or impede* their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B) (emphasis added). In this case, the district court certified the class under Rule 23(b)(1)(B), finding that "[t]he need to protect Class members' 'common interests' in the insurance proceeds subject to the coverage dispute demands a unitary resolution permitting equitable distribution," and that – absent a unitary resolution – a "significant risk" existed that "allowance of individual adjudications by class members" would result in the coverage being lost, and with it the class members' only prospect of meaningful recovery. CA 231a, 232a (162

F.R.D. at 526, 527). Moreover, as an *alternative* holding, the district court found that although Rule 23(b)(1)(B) "does not require" a limited fund, "there is a limited fund in this case." CA 233a (162 F.R.D. at 527) (citing 491a-492a) (Conclusions of Law, ¶¶37-39).

The Fifth Circuit affirmed the district court's analysis and conclusions, both in its original opinion, CA 72a-85a (90 F.3d at 982-88), and after remand from this Court, CA 2a-3a (134 F.3d at 670). NASCAT respectfully submits that, given the facts and circumstances of this case, the language and purpose of Rule 23(b)(1)(B), as well as relevant federal court precedents, the district court properly certified the Class and approved the settlement of this case, and the Fifth Circuit correctly affirmed that judgment.

B. The Language And Meaning Of Rule 23(b)(1)(B) And Its Prescribed Interpretation

As the district court observed, "Rule 23 is to be interpreted according to its 'plain meaning,' " 230a (162 F.R.D. at 526) (citing *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989)), and the express language of subdivision (b)(1)(B) directs the lower courts to weigh the *practical* effect of separate actions upon class members. As emphasized by Professor Kaplan, the Reporter to the Advisory Committee when Rule 23 was revised in 1966:

> In new subdivision (b)(1)(B) the Committee took up a vantage point within the class, and spied out situations where lawsuits conducted with individual members *would have the practical if not technical effect* of concluding the interests of the other members as well, or of impairing the ability of the others to protect their own interests.

Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*,

81 Harv. L. Rev. 356, 388 (1967) (emphasis added). Subdivision (b)(1)(B) applies to "situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, *might do so as a practical matter.*" Advisory Committee Notes to 1966 Amendments, 39 F.R.D. 69, 100-01 (1966) (emphasis added) ("Advisory Committee Notes").[7]

Because of this emphasis on the *practical* effects of separate adjudications, "the determination of whether a particular action falls within the ambit of the rule depends largely on the facts of each case." 7A Wright, Miller & Kane, § 1774, at 443. An examination of the reported cases demonstrates that the federal courts' construction and application of subdivision (b)(1)(B) has been motivated by the real life practical importance of providing people a collective procedure for remediating their claims when the alternative of leaving them to individual lawsuits creates a risk of prejudice, unequal treatment, or incomplete relief. Moreover, reference to the ample factual record in this case demonstrates that the district court conducted the requisite analysis of the facts

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[7] Other commentators on subdivision (b)(1)(B) concur. *See* 5 J. Moore, ¶23.42[1], at 23-172 ("Rule 23(b)(1)(B) focuses on the members of the putative class and seeks to protect them against situations in which they would be prejudiced by separate litigation. In order to warrant class certification. . . . the risk of prejudice need only be practical, not legal or technical.") 7A Wright, Miller & Kane, § 1774, at 437 (Rule 23(b)(1)(B) does not require that individual adjudications be legally binding on absentees; rather, it "simply states that separate actions 'as a practical matter' would affect the absent parties without giving them the protection of representation in the action.") (footnote omitted).

and the "substantial risk" facing class members and properly certified a Rule 23(b)(1)(B) non-opt-out class.

C. Rule 23(b)(1)(B) Permits Certification Of Non-Opt-Out Classes In Cases Involving "Common Risks" To Class Members, Not Just Cases Involving "Limited Funds"

Contrary to the assertions of Petitioners and their *amici*, *see* Pet. Brief. at 23-31; Trial Lawyers Brief at 7-13, although the Advisory Committee Notes to the 1966 amendment to Rule 23 enumerated several types of cases in which a class would be properly certified under subdivision (b)(1)(B), *see* 39 F.R.D. at 101-02, these examples are by no means exclusive. One commentary on the federal rules emphasizes that "[s]everal other types of actions not mentioned by the Advisory Committee have been accepted by the courts under Rule 23(b)(1)(B)." 7A Wright, Miller & Kane, § 1774, at 445. Thus, although class certification under subdivision (b)(1)(B) is authorized in so-called "limited fund" cases,[8] and the district

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[8] Class certification in cases involving a "limited fund" was clearly envisioned by the drafters of modern Rule 23(b)(1)(B). *See* Advisory Committee Notes, 39 F.R.D. at 101 ("In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. *This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims.*") (emphasis added); *see also* 7A Wright, Miller & Kane, § 1774, at 441 ("An obvious example of the type of action to which Rule 23(b)(1)(B) is applicable is one in which the class members have claims against a fund that may prove insufficient to satisfy all of them.") (footnote and citations omitted); 5 J. Moore, ¶23.42[2][a], at 23-172 ("The most common use of Rule

court and Fifth Circuit properly reached the alternative holding that this case fits within that category, *see* CA 233a-234a (162 F.R.D. at 527), CA 72a-85a (90 F.3d at 982-88), affirmance in this Court need not exclusively rest upon a finding that a "limited fund" existed. *See* Advisory Committee Notes, 39 F.R.D. at 100-01.[9] In numerous reported cases that Petitioners ignore, the federal courts have properly certified classes under subdivision (b)(1)(B) because class members – whether plaintiffs *or* defendants – faced an unacceptable (but common) risk if they could not achieve a unitary resolution.

In *In re Alexander Grant & Co. Litigation*, 110 F.R.D. 528 (S.D. Fla. 1986), a securities fraud action, defrauded investors sought to certify over 300 partners in a national accounting firm (Grant) as a defendant class. Observing that the alternative to certification of a subdivision (b)(1)(B) class would require plaintiffs to conduct separate trials against the individual accounting partners, a result which it found would "unduly delay and postpone the ultimate resolution of the cases," *id.* at 537, the court stated that such piecemeal litigation, as a practical matter, would create an unacceptable risk for each putative class member:

23(b)(1)(B) class actions is in 'limited fund cases.' ") (footnote omitted).

[9] *See* CA 491a (Conclusions of Law, ¶37) ("A class may be certified under Rule 23(b)(1)(B) irrespective of whether a 'limited fund' may be said to exist.") (citing *White v. National Football League*, 822 F. Supp. 1389, 1411 (D. Minn. 1993), *aff'd on other grounds*, 41 F.3d 402 (8th Cir. 1994), and *Specialty Cabinets & Fixtures v. American Equitable Life Ins. Co.*, 140 F.R.D. 474, 477 (S.D. Ga. 1991)).

> [A] finding in the first trial that a Grant partner was responsible for authoring financial statements containing materially misleading information would substantially bar the other partners from asserting a contrary position. Thus, these partners would be foreclosed from defending their interests. . . .
>
> [T]he court finds that the only method for protecting the rights of Grant partners is to require their appearance, at one time, before this court. Thus, they will not be faced with an inability to defend their interests owing to a prior determination on the primary issue of liability.

Id. at 537-38 (footnote and citations omitted). In *Alexander Grant*, the district court also "note[d] the practical problem" presented by denying certification under subdivision (b)(1)(B): "Should individual partners be allowed to opt-out, this court faces the likely prospect of relitigating identical issues of law and fact in several trials. This occurrence would place an unnecessary burden upon the judicial system." *Id.* at 538.[10]

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[10] As in this case, *see* CA 233a-234a (162 F.R.D. at 527), in *Alexander Grant*, 110 F.R.D. at 538, the district court alternatively held that a "limited" (or "common") fund existed, thereby justifying (b)(1)(B) certification:

> Additional consideration must also be given to protecting the [accounting] partners' interests in a common fund – their professional liability insurance coverage. Separate adjudications conceivably would exhaust coverage leaving subsequently tried partners to pay legal fees from their own pocket and leave them with only personal assets from which to compensate plaintiffs. Thus, this court must concern itself with the interests of all partners while keeping an eye on the conservation of both partnership and individual assets.

Alexander Grant was followed by Chief Judge Ziegler in *In re Phar-Mor, Inc. Securities Litigation*, 875 F. Supp. 277 (W.D. Pa. 1994), another securities fraud action brought against an accounting firm (Coopers). The district court granted plaintiffs' motion to certify partners of the accounting firm as a defendant class under subdivision (b)(1)(B) because "the prosecution of separate actions would substantially impair the ability of the individual class members to protect their interests," and elucidated the common "significant risk" faced by class members:

> Because, under the theory of joint and several liability, all partners are legally responsible for the negligence of a single partner, a finding of liability against Coopers and any of the representative partners or principals would have a substantial effect on the interests of the putative class members. . . . Here, a finding that the negligent or fraudulent acts of a partner or partners were responsible for plaintiffs' losses would effectively foreclose any defense by the putative class members.

Id. at 280.[11]

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110 F.R.D. at 538. *Accord Alexander Grant & Co. v. McAlister*, 116 F.R.D. 583, 590 (S.D. Ohio 1987) (granting certification of class of counter-defendant accounting partners under Rule 23(b)(1)(B) because if investors' "class claims were tried in many separate suits, the first determination would practically dispose of the later ones, as earlier liability determinations could be used against individual partners in later cases").

[11] In *Phar-Mor*, 875 F. Supp. at 280, the district court reached the same alternative holding as in *Alexander Grant*, 110 F.R.D. at 538, as to the existence of a "common" (read "limited") fund, *see* note 10, *supra*, stating that "[s]uch concerns are also relevant here, where Coopers' insurance funds have been and will continue to be depleted during the prosecution of the

Phar-Mor was followed by Judge Lee in *In re Chambers Development Securities Litigation*, 912 F. Supp. 822 (W.D. Pa. 1995), a securities fraud action in which the district court certified a defendant class of 250 accounting partners under Rule 23(b)(1)(B) and (b)(3); the district court stated that "[a]s in *Phar-Mor*[ ], the prosecution of separate actions against individual Grant Thornton partners would substantially impair the ability of the individual class members to protect their interests, and fully comports with due process concerns." *Id.* at 836.

In these cases, as in the present case, the trial courts properly found that the potential prosecution of separate actions ("piecemeal litigation") created a "substantial risk" of impairment of individual class members' rights and interests, as Rule 23(b)(1)(B) requires, whether those class members were plaintiffs *or* defendants. In *Alexander Grant*, *Phar-Mor*, and *Chambers Development*, the class members – individual partners in accounting firms who had been sued for securities fraud – faced the practical risk of being unable to defend themselves if piecemeal litigation was conducted and one or more of the early cases established liability on the part of any one of them. While the common risk they shared was a function of partnership law, it is analogous to the common risk shared by class members in this case, as found by the district court: That the insurance coverage dispute would proceed absent a unitary resolution and would present a "substantial probability" that Fibreboard's claimed

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[defrauded investors'] actions, with the possible result that little or no funds will be available for the putative class members to use in defense of any claims brought against them in separate actions." 875 F. Supp. at 280.

insurance coverage – the class members' only source of recovery – would be lost. CA 230a-231a (162 F.R.D. at 526).

Petitioners and their *amici* ignore anotner body of related (and relevant) cases wherein classes are certified under subdivision (b)(1)(B) because the prosecution of separate actions could create a risk of inconsistent or varying adjudications. For example, in *Becher v. Long Island Lighting Co.*, 164 F.R.D. 144 (E.D.N.Y. 1996), an ERISA and state law action brought by current and former employees against their employer, its pension plan, and the plan administrator, the court found that the failure to certify a class of current and former employees who withdrew contributions from an employer-sponsored pension plan and sought to challenge a determination that their withdrawals resulted in a forfeiture of certain pension benefits would create a risk of inconsistent adjudications. The court observed that "[f]ailure to certify the class could result in multiple suits regarding the trustees' interpretation of" the plan, and "[e]ach case could conceivably result in different courts reaching conflicting decisions regarding not only the Plan's interpretation but also the applicability of the various defenses the defendants seek to impose." *Id.* at 153.[12]

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[12] *See also Death Row Prisoners of Pennsylvania v. Ridge*, 169 F.R.D. 618, 623 (E.D. Pa. 1996) (certifying class consisting of all present and future state death row inmates who had not yet filed petitions for habeas corpus review to challenge state's status under federal Antiterrorism and Effective Death Penalty Act); *White*, 822 F. Supp. at 1409 (in professional football players' antitrust class action against NFL challenging league's employment practices, finding that if individual players filed separate actions seeking injunctive relief, there was a substantial risk of inconsistent or varying adjudications).

The same "substantial risk" of piecemeal litigation which would invariably lead to inconsistent or varying adjudications regarding the availability and extent of Fibreboard's insurance coverage was clearly present in this case. The district court found that this coverage dispute (and, thus, the common risk to the class) could be resolved "only" through a unitary class action under Rule 23(b)(1)(B). CA 241a (162 F.R.D. at 530). As Judge Parker elaborated:

> Resolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised. On these facts, allowance of individual adjudications by class members would have destroyed the opportunity to compromise the insurance coverage dispute . . . and would have exposed the class members to the very risks that the settlement addresses – a situation that falls squarely under Rule 23(b)(1)(B).

CA 490a (Conclusions of Law, ¶35) (citations omitted); *see also* CA 231a-233a (162 F.R.D. at 526-27).

D. Rule 23(b)(1)(B) Also Permits Certification Of Non-Opt Out Classes In Cases Involving "Limited Funds"

As an *alternative* holding, the district court found that "the 'limited fund' may be viewed as the sum of the value of Fibreboard plus the value of its insurance coverage. . . . Under this scenario, the limited fund would equal at most approximately $1.77 billion." CA 492a (Conclusions of Law, ¶39) (citations omitted); *see also* CA 73a (90 F.3d at

982).[13] Rule 23 is intended to apply "when claims are made by numerous persons against a fund insufficient to satisfy all claims," Advisory Committee Notes, 39 F.R.D. at 101, and, under such circumstances, subdivision (b)(1)(B) " 'is designed to preserve the limited fund for the entire class against the individual claims of class members,' which claims might otherwise exhaust the limited fund and thereby leave subsequent plaintiffs with no remedy." *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1303 (2d Cir. 1990) (citations omitted). Class certification in "limited fund" cases is intended to "ensure that allocation of defendant's finite funds does not depend on which party rushes to the courthouse first

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[13] In this case, the district court properly held that "Rule 23(b)(1)(B) certification does not require a fixed asset or piece of property in which all class members have a preexisting interest." CA 489a (Conclusions of Law, ¶34); *see also* CA 233a-234a (162 F.R.D. at 527). As one treatise defines a "limited fund":

> A limited fund case is an action in which any recovery will come from a fixed pool of assets that is or may be insufficient to satisfy all of the claims against the fund. The fund must be the plaintiffs' sole source of recovery.
>
> *If the assets of the defendants, as extended by applicable insurance coverage but as limited by the insurers' assets, is insufficient to satisfy all of the plaintiffs' claims, the sum of those assets constitutes a limited fund. . . .*

5 J. Moore, ¶23.42[2][a], at 23-172 to 23-173 (emphasis added; footnotes omitted). Judge Parker's alternative holding – that the "limited fund" may be viewed as the sum of Fibreboard's net asset value plus the value of its insurance coverage, CA 492a (Conclusions of Law, ¶39) – fits squarely within the underscored language quoted above.

or chooses a courthouse that can render swifter results than others." 5 J. Moore, ¶23.42[2][a], at 23-173; *see also Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977) (Rule 23(b)(1)(B) certification granted: "In no event . . . should this litigation become an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest."), *mandamus denied sub nom. Union Light, Heat & Power Co. v. United States District Court*, 588 F.2d 543 (6th Cir. 1978); *United States Trust Co. of New York v. Alpert*, 163 F.R.D. 409, 419 (S.D.N.Y. 1995) (same; "The Fund herein is . . . a finite one that would be depleted with each payout and would not be sufficient to pay all claimants. Its distribution should not depend on who rushes to the courthouses first or chooses those courthouses that can render swifter results than others.").[14]

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[14] As Professor Miller put the matter:

> The paradigm Rule 23(b)(1)(B) case is one in which there are multiple claimants to a limited fund . . . and there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for latecomers.

Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present and Future* 45 (Fed. Jud. Center 1977). *See also In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 735 (2d Cir. 1992) (defining "classic instance of a 'limited fund' " as where "a group of claimants asserted claims of an aggregate amount that would deplete a fixed sum of money" and explaining that "a (b)(1)(B) class action is appropriate to avoid an unfair preference for the early claimants at the expense of later claimants"); *In re "Agent Orange" Prods. Liab. Litig.*, 100 F.R.D. 718, 725 (E.D.N.Y. 1983) (same), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

The wealth of precedent involving limited fund cases has delineated the circumstances under which class certification will be permitted; in the words of one commentary:

> The availability of an action under subdivision (b)(1)(B) in this context not only is fair to all members of the class but it eliminates a serious threat of multiple litigation. *But the limited nature of the funds available to satisfy the individual claimants must be clear; a mere allegation that defendant has limited resources will be insufficient.*

7A Wright, Miller & Kane, § 1774, at 443 (footnote omitted).[15] As a result, when such proof is not adduced, or when the district court fails to require it or properly analyze it, certification under subdivision (b)(1)(B) will not be granted by the trial court or it will be reversed on appeal. *See, e.g., In re Bendectin Products Liability Litigation*, 749 F.2d 300, 305-06 (6th Cir. 1984) (district court was "clearly erroneous" in certifying (b)(1)(B) class in products liability action brought by persons exposed *in utero* to prescription drug to recover for injuries because certification order "state[d] without support" that "limited fund" existed and "[n]o findings were made on the record as to this conclusion").[16]

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[15] *See also* 5 J. Moore, ¶23.42[2][c], at 23-175 (to obtain Rule 23(b)(1)(B) certification "on the basis of a limited fund, a party must submit specific evidence showing that the fund may be depleted through individual litigation before all members' claims can be satisfied"); *In re First Commodity Corp. Consumer Accounts Litig.*, 119 F.R.D. 301, 312 (D. Mass. 1987) (same).

[16] *Compare In re Dennis Greenman Secs. Litig.*, 829 F.2d 1539, 1545-46 (11th Cir. 1987) (certification of class on basis that some plaintiffs might bankrupt potential sources of recovery if allowed to proceed individually was improper, absent specific

In this case, the district court heard eight days of testimony, including 18 witnesses, considered hundreds of documents and made extensive findings as to the

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findings of defendants' financial status); *In re Northern District of Calif. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 851-52 (9th Cir. 1982) (error to certify a limited fund punitive damages class without hearing evidence of defendant's net worth, earnings, or available insurance coverage and establishing "as a fact" that defendant's assets were too limited to permit conventional litigation); *Clarke v. Advanced Private Networks, Inc.*, 173 F.R.D. 521, 522-23 (D. Nev. 1997) (same); *In re Telectronics Pacing Sys., Inc. Prods. Liab. Litig.*, 172 F.R.D. 271, 285 n.9 (S.D. Ohio 1997) ("The Court cannot certify a limited fund class without making findings concerning the existence of a limited fund"); *Fogie v. Rent-A-Center*, 867 F. Supp. 1398, 1403 (D. Minn. 1993) ("limited fund" doctrine could not be invoked when plaintiff consumers "have not produced evidence that there is a limited fund to satisfy judgment"); *with Doe I v. Karadzic*, 176 F.R.D. 458, 463 (S.D.N.Y. 1997) (in action brought on behalf of persons who suffered human rights violations at hands of Bosnian-Serb forces, certification was proper to preserve limited fund for benefit of entire class; "Class certification will prevent a situation where one plaintiff lays claim to the lion's share of defendant's limited resources, leaving thousands of others with nothing simply because they lost the race to the courthouse."); *"Agent Orange"*, 100 F.R.D. at 727 (following evidentiary hearing, district court concluded that there was "substantial probability that punitive damages, if allowed will, when added to compensatory damages, exceed defendants' assets"); *Coburn*, 77 F.R.D. at 45 (certification granted in personal injury and wrongful death actions arising from fire at supper club; plaintiffs demonstrated that claims in excess of $1.5 billion "have already been asserted in the suits now on file," judgments in the 164 actions for wrongful death "might reasonably exceed" $16 million, "[d]amages for injuries are not calculable at this stage" and defense counsel advised court that the corporate defendant had $3 million in assets).

existence of a "limited fund." *See, e.g.*, CA 491a (Conclusions of Law, ¶38) (citing CA 266a-272a, 291a-332a and 347a-348a) (Findings of Fact, ¶¶36-47, 89-181 and 203). These findings were properly affirmed by the Fifth Circuit. *See* CA 72a-85a (90 F.3d at 982-88), CA 2a (134 F.3d at 670). Indeed, the Fifth Circuit's original opinion in this case was followed by Judge Bechtle in *In re Orthopedic Bone Screw Products Liability Litigation*, 176 F.R.D. 158 (E.D. Pa. 1997), a products liability action brought against the manufacturer of pedicle screws (AcroMed). A "limited fund" class was certified because the parties offered evidence and expert testimony demonstrating that defendants' "net assets and insurance coverage are vastly insufficient to satisfy the many claims against them" and the "anticipated defense costs" to be incurred by the corporate defendant (AcroMed) "will alone be sufficient to consume [its] asset base"; Judge Bechtle observed that "[a]fter incurring those defense costs, AcroMed would have little or no ability to pay settlements or judgments to plaintiffs in individual cases." *Id.* at 177. Noting that the settlement would enable AcroMed to borrow $100 million and thereby increase the amount available to claimants, the district court analogized that case to this case:

> [T]here is neither a challenge, nor a basis for a challenge to the notion that this settlement can not be funded from cash on hand or from the liquidation of existing assets. It will be funded from an outside infusion of $100 million of borrowed funds not otherwise available except for the terms of the settlement. In this respect, this case shares much in common with *Ahearn*. In both cases, the settlement funds are provided

> primarily by non-defendants who have no obligation to provide them.

Id.

As the district court did in this case, in *Orthopedic Bone Screw* Judge Bechtle focused on the real life practical risks facing class members *and* the corporate defendant if Rule 23(b)(1)(B) certification was denied and the litigation continued with the foreseeable race to the courthouse and race to early judgments, necessarily taking into account the "unassailable history" of the litigation up to that point in time:

> In this case it is important to re-emphasize that it is the settlement itself that creates the fund from otherwise unobtainable outside resources. This infusion of new money is the *sine qua non* of the settlement. Without this infusion, the settlement cannot be accomplished and without the settlement, AcroMed will consume itself by exhausting all of its resources including its traditional borrowing potential. Because it is prudent to conclude from the unassailable history of this litigation that AcroMed can neither win nor avoid defending all of the cases presently proceeding against it, the conclusion that is equally unassailable is that the settlement is crafted around a limited fund. An unwillingness to recognize this will lead to the unacceptable result of many deserving claimants being unable to recover by settlement or judgment. This will surely follow the exhaustion of AcroMed's assets by either substantial use of resources in defense of all of the cases which course will be shortened by payments of recoveries by claimants earlier in time. This settlement shuts off AcroMed's defense cost flow and places all claimants on the same plane, at the same time, with respect to AcroMed's financial capacity to

> respond to all of the claims, leaving each claimant's share to be determined by traditional application of equitable distribution standards. If this settlement fails, the funds that AcroMed can raise conditioned on the settlement going forward will of course not be available to class members. The loss of the settlement fund is therefore a "risk" within the meaning of Rule 23(b)(1)(B).

176 F.R.D. at 177 (citation omitted).

In their discussion of so-called "limited fund" cases, Petitioners and their *amici* pay scant attention to the Second Circuit's opinion in *Drexel*, which approved Judge Pollack's certification of a mandatory non-opt-out class in securities litigation brought against the bankrupt brokerage firm.[17] In that case, Drexel agreed to create a $350 million fund to be administered by the SEC, which was to distribute the fund to the victims of Drexel's illegal transactions in "junk bonds." 960 F.2d at 288. Drexel paid $200 million into the SEC Fund in September 1989 and agreed to pay the remaining $150 million in two installments over the next three years. However, in February 1990 (before Drexel had paid any of the remaining $150 million), it filed a Chapter 11 bankruptcy petition. *Id.* To facilitate settlement of 850 claims arising out of Drexel's actions in buying, selling, and underwriting securities, Judge Pollack withdrew these claims from the bankruptcy

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[17] In this case, both the district court and the Fifth Circuit cited *Drexel* with approval. *See* CA 489a & n.2 (Conclusions of Law, ¶33), CA 231a-232a (162 F.R.D. at 526), CA 74a (90 F.3d at 983) (stating that in *Drexel*, 960 F.2d at 292, "the Second Circuit approved a [Rule] 23(b)(1)(B) class action on the ground that individual litigation would reduce the recovery for all plaintiffs from Drexel's limited assets").

court and ordered the establishment of the Securities Litigation Claimants Group, which eventually negotiated a settlement under which Drexel would pay the $150 million balance it owed the SEC Fund and the $350 million total would be divided between two subclasses. *Id.*[18]

Affirming Judge Pollack's certification of a (b)(1)(B) class and approval of the settlement agreement, the Second Circuit found the requirements of Rule 23 to have been satisfied:

> Drexel's assets to satisfy the Securities Claims are finite. A succession of individual actions to determine Drexel's liability on each claim would involve costly litigation, thereby depleting Drexel's already limited resources. The diminution of Drexel's estate from protracted litigation would doubtless reduce the amount ultimately recovered by each member of the putative class.

960 F.2d at 292 (citing *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 685 (2d Cir. 1977)). Recognizing that "the limited fund here is quite different from the limited fund present in most class actions" certified under subdivision (b)(1)(B), in *Drexel* the court of appeals nevertheless found that the facts and circumstances of the case fit within Rule 23's necessarily broad and flexible confines

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[18] Petitioners characterize *Drexel* as holding that Rule 23 (b)(1)(B) certification was only "appropriate in connection with bankruptcy reorganization of Drexel's 'estate,' " Pet Brief. at 34 n.31 (citing *Drexel*, 960 F.2d at 288-92), ignoring the fact that Judge Pollack *withdrew* the securities claimants' claims from the bankruptcy court. The Second Circuit's opinion upholding certification of a subdivision (b)(1)(B) "limited fund" class in *Drexel* was in no way limited to cases involving bankruptcy reorganizations.

and affirmed Judge Pollack's approval of a non-opt-out class:

> [E]ven though Drexel's assets will not be distributed to claimants until final approval of Drexel's reorganization plan, some members of the putative class might attempt to maintain costly individual actions in the hope and, perhaps, the belief that their claims are more meritorious than the claims of other class members. A mandatory class action under Rule 23(b)(1)(B) is thus necessary here to prevent claimants with such motivations from unfairly diminishing the eventual recovery of other class members.
>
> For the same reasons that we find that the class can be maintained under Rule 23(b)(1)(B), we hold that the district court did not abuse its discretion in prohibiting any member of the putative class to opt out of the class. To allow a class member to opt out would involve costly litigation to estimate the amount of that member's claim, thereby reducing Drexel's already-limited fund of assets.

Id.

In this case, the district court and the Fifth Circuit followed the letter and spirit of Rule 23(b)(1)(B), as well as the reported cases cited and discussed above, conducted a thorough analysis of the facts and circumstances facing putative Class members and Fibreboard, and properly concluded that certification of a "limited fund" class was proper. *See* CA 233a-234a (162 F.R.D. at 527); CA 491a-492a (Conclusions of Law, ¶¶37-40); CA 72a-85a (90 F.3d at 982-88); CA 2a-3a (134 F.3d at 670). In any event, this was an *alternative* holding both of the district court and the appellate court. Thus, the decision of the Fifth

Circuit can be affirmed by this Court on the common "substantial risk" provision of Rule 23(b)(1)(B) alone.

CONCLUSION

For the reasons stated, NASCAT respectfully submits that the decision of the Fifth Circuit should be affirmed.

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Respectively submitted,

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